TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 150.

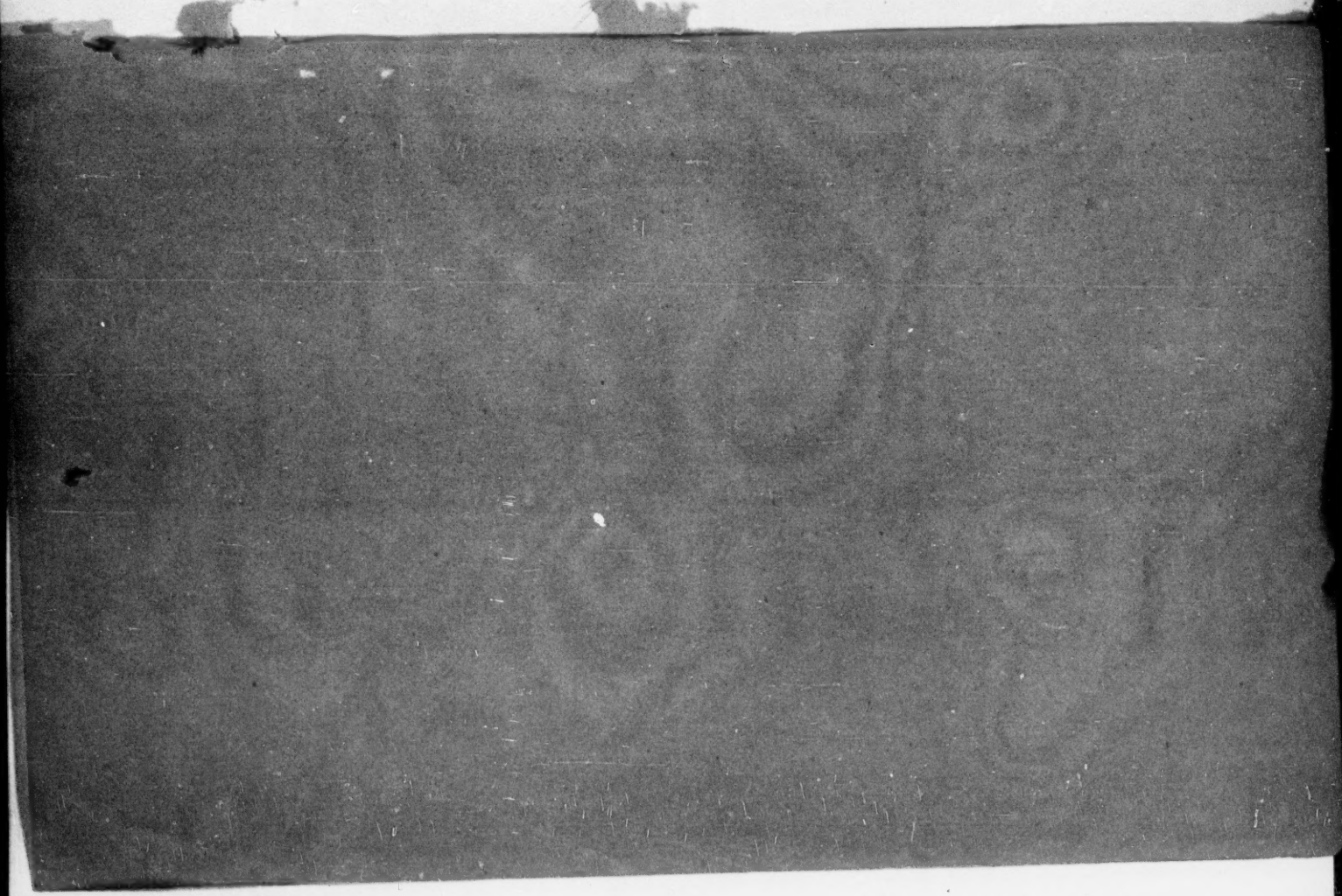
[illegible] PLAINTIFF IN ERROR,

vs.

[illegible] HARRIET B. COOLEDGE, AND HELEN [illegible] HEIRS OF WILLIAM B. MORRIS, DE-[illegible]

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE [illegible] DISTRICT OF MARYLAND.

FILED [illegible], 1883.



SUPREME COURT OF THE UNITED STATES

No. 153.

HOWARD STEBBINS, PLAINTIFF IN ERROR,

vs.

MARIA L. DUNCAN, HARRIET B. COOLEDGE, AND HELEN COOLEDGE, DEVISEES OF WILLIAM B. MORRIS, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Friday, the eighteenth day of July, in the year of our Lord one thousand eight hundred and seventy-nine, and of our Independence the one hundred and fourth.

WILLIAM H. BRADLEY, *Clerk.*

MARIA L. DUNCAN, HARRIET B. COOLEDGE, AND Helen Cooledge, devisees of William B. Morris, deceased,
v.
HOWARD STEBBINS. } Ejectment.

NORTHERN DISTRICT OF ILLINOIS, *sct:*

Be it remembered that on the sixteenth day of November, A. D. 1872, came the plaintiff, William B. Morris, by Messrs. Dent and Black, his attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, a notice to restore the files in said entitled cause
2 which said notice is in the words and figures following, to wit:

Notice to restore files.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

WILLIAM B. MORRIS
v
HOWARD STEBBINS.

To said defendant or Messrs. Wead and Jack, his att'ys:

Please take notice that at the opening of said court Saturday morning next (November 16th inst.), or as soon thereafter as the matter can be heard, we shall move the court to redocket the above-entitled cause, and shall ask leave to restore the files therein by substituting copies in the place of the original files, which were destroyed in the great conflagration of Oct. 8th and 9th, 1871. We herewith submit a substantial copy of the original declaration and notice, a duplicate of which copy will be filed by us at the time above mentioned; and we shall ask for a rule upon you to restore a copy of your plea in the case.

Chicago, Nov. 5, 1872.

DENT AND BLACK,
Pl'ffs Att'ys.

Rec'd a copy of the foregoing.

WEAD AND JACK,
Att'ys for Def't.

PEORIA, *Nov.* 13, 1872.

(Endorsed:) Filed Nov. 16, 1872. Wm. H. Bradley, cl'k.

1815——1

3 On the same day, to wit, the 16th day of November, A. D. 1872, in the adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

WILLIAM B. MORRIS } Ejectment.
v.
HOWARD STEBBINS. }

On motion of the plaintiff, by Thomas Dent, esq., his attorney, upon affidavit filed, leave is given him to file in place of the original declaration, notice, proof of service, and bond for costs, heretofore filed herein and destroyed by fire on the ninth of October, eighteen hundred and seventy-one, substantial copies of the same; and it is ordered that said copies be substituted for and have the same effect as the originals so destroyed, and thereupon, on further motion of said attorney, the defendant is hereby ruled to file herein a substantial copy of the original plea heretofore filed herein and destroyed by fire, within ten days after service of a copy of this order upon him.

And on the same day, to wit, the 16th day of November, A. D. 1872, said plaintiff, by his attorneys, filed in said clerk's office, copies of
4 the original bond for costs and declaration in said entitled cause, which said copies are respectively in the words and figures following, to wit:

Bond for costs.

UNITED OF AMERICA,
Northern District of Illinois, ss:

Circuit court, Oct. term, A. D. 1869.

WILLIAM B. MORRIS } In ejectment.
v.
HOWARD STEBBINS. }

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, we hereby agree and stipulate that execution may issue against our property for any costs taxed against him.

Dated this 12th day of Sept., A. D. 1869.

DENT AND BLACK.

(Endorsed:) Filed Nov. 16th, A. D. 1872. Wm. H. Bradley, clerk.

Declaration.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois, of the October term, in the year of our Lord one thousand
5 eight hundred and sixty-nine.

William B. Morris, who is a citizen of the State of Massachusetts, plaintiff, by Dent and Black, his attorneys, comes and complains of Howard Stebbins, of said district, and a citizen of the State of Illinois, defendant, who has been notified according to the form of the statute in such case, made and provided in a plea of ejectment.

For that whereas the said plaintiff was, on the first day of April, in the year of our Lord one thousand eight hundred and sixty-nine, possessed of a certain tract of land, with the appurtenances, situate in the county of Stark and State of Illinois, and known, designated, and described as follows, viz:

The southeast quarter of section thirty-four (34), in township twelve (12) north, range six (6) east, containing one hundred and sixty (160) acres, more or less.

Which said premises the said plaintiff claims in fee simple, and the said plaintiff, being so possessed thereof, the said defendant afterward, to wit, on the first day of April, in the year of our Lord one thousand eight hundred and sixty-nine, entered into the said premises and ejected the said plaintiff therefrom, and unjustly withholds from the said plaintiff
6 the possession thereof, to the damage of said plaintiff of five hundred dollars, and therefore he brings suit, etc.

DENT AND BLACK,
Attorneys for Plaintiff.

To HOWARD STEBBINS:

You are hereby notified that the declaration of which the within is a copy will be filed in the circuit court of the United States for the northern district of Illinois on the first day of the term thereof, to be held on the first Monday of October, A. D. 1869; that upon filing the same a rule will be entered requiring you, the defendant, to appear and plead to which declaration within twenty days from the entry of such rule, and that if you neglect so to appear and plead, a judgment by default will be entered against you, and the plaintiff will recover possession of the premises.

Dated this day of September, A. D. 1869.

DENT AND BLACK,
Pl'ff's Att'ys.

STATE OF ILLINOIS,
Cook County, ss:

Samuel Adams, being duly sworn, says on oath that he is sheriff of said county, and did, on the day of September, A. D. 1869, serve on the within-named Howard Stebbins the within and foregoing declaration and notice by giving him a copy of each thereof.

7 (Signed) SAMUEL ADAMS.

Subscribed and sworn to before me this day of Sept., A. D. 1869.

WILLIAM B. MORRIS } In ejectment.
v.
HOWARD STEBBINS. }

U. S. circuit court, northern dist., Ill.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Thomas Dent being duly sworn, says, on oath, that he is one of the at-

torneys for the plaintiff in the above-entitled cause; that said cause was pending at the time of the great fire of October 8th and 9th, 1871, by which the files therein were destroyed; that deponent has no copy of said files taken from the originals, but herewith submits what, according to his recollection, is substantially a copy of the bond for costs and declaration, and also of the notice to the defendant. Deponent does not remember what officer made the jurat to the affidavit of service of said declaration and notice, but believes that the affidavit was regularly made in due form, and the defendant appeared and filed a plea of the general issue by Messrs. Wead and Jack, his attorneys.

THOMAS DENT.

8 Subscribed and sworn to before me this 16th day of Nov., A. D. 1872.

E. A. DRUMMOND,
U. S. Com.

(Endorsed:) Filed this 16th day of Nov., 1872. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 22d day of November, A. D. 1872, said defendant, by his attorneys, filed in said clerk's office a copy of the plea originally filed by said defendant in said entitled cause, which said plea is in the words and figures following, to wit:

Plea.

[Substantial copy of plea.]

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court for the northern district of Illinois. October term, A. D. 1869.

WILLIAM B. MORRIS
v.
HOWARD STEBBINS.

And now comes the said defendant, by Wead and Jack, his attornies, and for plea says he is not guilty of unlawfully withholding the premises claimed by the plaintiff, as alleged in his declaration, and this he prays may be enquired of by the country.

By WEAD AND JACK,
His Attornies.

9 (Endorsed:) Filed Nov. 22, 1872. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 8th day of March, A. D. 1875, in the adjourned March term of said court in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

WILLIAM B. MORRIS
v.
HOWARD STEBBINS. } Ejectment.

Now come the parties by their attorneys, and now comes on to be heard the motion of the defendant to suppress the depositions of George Collard and Erasmus J. Middleton, taken on the part of the plaintiff, and filed herein, and, after hearing the arguments of counsel, the court overrules said motion; and thereupon, by agreement, it is ordered that this cause be continued.

Afterwards, to wit, on the 14th day of December, A. D. 1877, in the adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

WILLIAM B. MORRIS
v.
HOWARD STEBBINS. } Ejectment.

10 Now come the parties, by their attorneys, and upon issue joined thereupon, come a jury of good and lawful men, to wit, D. S. Putnam, Isaac R. Lyon, Lawrence Kennedy, Herman Buerning, John Stanley, Freeman L. Pratt, Thornton G. Hains, Ira C. Mosier, Nathaniel Vose, S. W. Kingsley, W. R. Guild, and William H. Coulston, who were all duly elected, tried, and sworn, well and truly, to try said issue, and after hearing a part of the evidence the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

Afterwards, to wit, on the 15th day of December, A. D. 1877, in the said adjourned October term of said court in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

WILLIAM B. MORRIS
v.
HOWARD STEBBINS. } Ejectment.

Now come again the parties, by their attorneys, and now come also the jury in this behalf, empaneled and sworn, and after hearing the concluding evidence and the arguments of counsel, and receiving the instructions of the court, the jury returned the following verdict, to wit: We, the jury, find the defendant guilty of unlawfully withholding from the possession
11 of the plaintiff the real estate and premises described in his declaration, as follows: A certain tract of land with the appurtenances situate in the county of Stark, and State of Illinois, designated and described as follows, to wit: the southeast quarter of section thirty-four (34), in township twelve (12) north, range six (6) east, containing one hundred and sixty (160) acres, more or less. We also find the estate established in the plaintiff on the trial to be an estate in fee simple, and assess his damages to the sum of one cent. And thereupon the defendant, by his attorney, moves the court for a new trial.

Afterwards, to wit, on the 23d day of February, A. D. 1878, said de-

fendant, by his attorneys, filed in said clerk's office his motion for a new trial in said entitled cause, which said motion is in the words and figures following, to wit:

Motion for a new trial.

United States circuit court, northern district of Illinois.

WILLIAM B. MORRIS
vs.
HOWARD STEBBINS. } Ejectment.

Now comes the defendant, by his attorney, Paddock and Ide, and moves to set aside the verdict rendered, and to grant a new trial in this cause.

12 And for grounds of his motion the defendant shows:

1. The court erroneously excluded from the jury on the trial the documentary evidence of an exemplification of a patent from the United States of the land in question, issued to John J. Dunbar, and of a deed of said land from said Dunbar to John Frank, offered in evidence by defendant for the purpose of showing an outstanding title in said Frank.

2. The court erred in ruling and permitting plaintiff to show title not connected with the United States, and in holding that the proof by the plaintiff showed that he was entitled to recover without other proof that the title was common to the plaintiff and defendant than plaintiff's affidavit.

3. The court improperly instructed the jury that the plaintiff was entitled to recover on the proof adduced on the trial.

4. The verdict is contrary to the law and the evidence in the case.

PADDOCK AND IDE,
Def't's Attorneys.

(Endorsed:) Filed Feb. 23d, 1878. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 5th day of March, A. D. 1878, in the
13 adjourned March term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

WILLIAM B. MORRIS
v.
HOWARD STEBBINS. } Ejectment.

The motion of the defendant heretofore entered herein for a new trial of this cause having this day been called up for hearing, now comes the defendant, by his attorney, and after hearing the arguments of the defendant's attorney, the court overruled said motion and awards judgment. It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant possession of the said real estate and premises aforesaid described, according to the force, form, and effect of his said recovery, and that he have a writ of possession therefor, and that he also have and recover of the defendant the said sum of one cent, his dam-

ages so as aforesaid assessed, together with his costs and charges in this behalf expended, amounting to the sum of dollars and cents, and that he have execution therefor.

Afterwards, to wit, on the 27th day of March, A. D. 1878, in the said adjourned March term of said court, in the record of the proceedings
14 thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

WILLIAM B. MORRIS
v.
HOWARD STEBBINS. } Ejectment.

Now comes the defendant by Paddock and Ide his attorneys, and moves the court to set aside and vacate the judgment and verdict heretofore entered herein and for a new trial; and it appearing to the court that the defendant has paid all the taxed costs herein; it is thereupon ordered by the court that the judgment entered herein on the fifteenth of December last, be set aside and vacated and a new trial granted under the statute.

Afterwards, to wit, on the 22d day of January, A. D. 1879, in the December term A. D. 1878, of said court in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

WILLIAM B. MORRIS
v.
HOWARD STEBBINS. } Ejectment.

Now come the parties, by their attorneys, and Thomas Dent, esq., the attorney of the plaintiff suggests to the court the death of the plaintiff,
15 William B. Morris, and that Maria L. Duncan, Harriet B. Cooledge, and Helen Cooledge are the devisees of said deceased, and on motion of the plaintiff's attorney it is ordered by the court that said devisees, Maria L. Duncan, Harriet B. Cooledge, and Helen Cooledge, be made plaintiffs herein.

Afterwards, to wit, on the 10th day of June, A. D. 1879, said defendant, by his attorneys, filed in said clerk's office his plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea.

United States circuit court, northern district of Illinois, ss.

MARIA L. DUNCAN, HARRIET B. COOLEDGE,
and Helen Cooledge
v.
HOWARD STEBBINS. } Ejectment.

And now comes said defendant by George O. Ide, his attorney, and says

that he is not guilty of unlawfully withholding the premises claimed by the plaintiffs as alleged, and of this he puts himself upon the country, &c.

By GEORGE O. IDE,
His Attorney.

(Endorsed:) Filed June 10, 1879. Wm. H. Bradley, cl'k.

16 Afterwards, to wit, on the 10th day of June, A. D. 1879, in the adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

MARIA L. DUNCAN, HARRIET B. COOLEDGE, and Helen Cooledge, devisees of William B. Morris, deceased,
v.
HOWARD STEBBINS.
} Ejectment.

Now come the parties by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit: H. F. Merrit, John Salisbury, Thomas North, John F. Fort, Sanford Rankin, Gustave Lange, James W. Brown, L. D. McDaid, C. B. Throop, W. K. Swallow, John G. Mitchell, and Robert Blake, who were all duly elected, tried, and sworn well any truly to try said issue, and after hearing the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

Afterwards, to wit, on the 11th day of June, A. D. 1879, in the said adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, dis-
17 trict judge, is the following entry, to wit:

MARIA L. DUNCAN, HARRIET B. COOLEDGE, and Helen Cooledge, devisees of William B. Morris, deceased,
v.
HOWARD STEBBINS.
} Ejectment.

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the arguments of counsel and receiving the instructions of the court, the jury returned the following verdict, to wit: We, the jury, find the defendant guilty of unlawfully withholding from the possession of the plaintiffs the real estate and premises described in their declaration as follows: A certain tract of land, with the appurtenances, situate in the county of Stark and State of Illinois, and known, designated, and described as follows, viz: the southeast quarter of section thirty-four (34), in township twelve (12) north, range six (6) east, containing one hundred and sixty (160) acres, more or less; we also find the estate established in the plaintiffs on the trial to be an estate in fee simple, and assess their damages to the sum of one cent.

And thereupon the defendant, by his attorney, moves the court for a new trial.

Afterwards, to wit, on the 5th day of July, A. D. 1879, said de-
18 fendant, by his attorney, filed in said clerk's office his motion for a new trial in said entitled cause, which said motion is in the words and figures following, to wit:

Motion for new trial.

United States circuit court, northern district of Illinois. December term, 1878.

MARIA L. DUNCAN, HARRIET B. COOLEDGE, and Helen Cooledge
v.
HOWARD STEBBINS. } Ejectment.

And now comes the defendant, by Paddock and Ide, his attorneys, and moves the court to set aside the verdict rendered and to grant a new trial in this cause for the following grounds:

1. The court admitted on the trial improper evidence for the purpose of showing the death of Wm. B. Morris, to wit, the copies of letters of administration and probate of will.

2. The court erred in admitting in evidence the certified copy of a deed from Dunbar to Prout and the writings thereon as evidence of the contents of the original deed and of the alleged record of said deed in Madison Co., Ills.

3. The court erred in overruling defendants' motion to exclude said copy and the alleged endorsements on said original deed as evidence of recording and otherwise.

19 4. The court erred in admitting the copy of the depositions of Middleton and Collard, the evidence of Corcoran as to taxes, the evidence of Hyde as to payment of taxes, and the contents of Boone's deposition; also, in admitting the alleged duplicate tax receipts without proof of signatures and official capacity of the signed.

5. The court erred in instructing the jury that the alleged deed from Dunbar to Prout was shown to have been recorded in Madison County on June 23, 1818; and in charging the jury to find for plaintiffs.

6. The court erred in not directing the jury to find for the defendant.

7. The verdict is contrary to the law and the facts of the case.

PADDOCK AND IDE,
Def'ts' Attorneys.

(Endorsed:) Filed July 5, 1879. Wm. H. Bradley, cl'k.

And afterwards, to wit, on the 18th day of July, A. D. 1879, in the July term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

MARIA L. DUNCAN, HARRIET B. COOLEDGE, and Helen Cooledge, devisees of Will-
20 iam B. Morris, deceased,
v.
HOWARD STEBBINS. } Ejectment.

Now come the parties by their attorneys, and now comes on to be heard

the motion of the defendant entered herein for a new trial of this cause, and after hearing the arguments of counsel, the court overrules said motion, and awards judgment on the verdict.

It is thereupon considered and adjudged by the court that the plaintiffs do have and recover of the defendant possession of the real estate and premises aforesaid, described according to the force, form, and effect of their said recovery, and that they have a writ of possession therefor, and that they also have and recover of the defendant the said sum of one cent, their damages, together with their costs and charges in this behalf expended, amounting to the sum of thirty-seven dollars and fifty-five cents, and that they have execution therefor.

And on the same day, to wit, the 18th day of July, A. D. 1879, on the trial of said cause, the following exceptions were taken and allowed by the court, and made of record in said entitled cause, to wit:

Bill of exceptions.

21 United States circuit court, northern district of Illinois, December term, A. D. 1878.

MARIA L. DUNCAN, HARRIET B. COOLEDGE, and Helen Cooledge *vs.* HOWARD STEBBINS. } Ejectment.

Be it remembered that on the trial of the issue in this cause before a jury, the plaintiffs, for the purpose of claiming under the 25th section of the ejectment act of the State of Illinois, that the plaintiffs claimed title to the premises in controversy through a common source with the defendant, read to the court the following affidavit:

Circuit court of the United States for the northern district of Illinois.

WILLIAM B. MORRIS *v.* HOWARD STEBBINS.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Thomas Dent, being duly sworn, states on oath that he is attorney for the plaintiff in the above entitled cause, and that the said plaintiff claims title to the premises in controversy in said cause through a common source with the defendant, that is to say, through Joseph Duncan, late of the State of Illinois, now deceased. The plaintiff claims through
22 said Duncan, and the defendant claims through Elizabeth C. Duncan, as widow of said Duncan, and Joseph Duncan, Julia S. Kirby, nee Duncan, and Mary L. D. Putnam, nee Duncan, as heirs at law of said Joseph Duncan, deceased; and the plaintiff also claims through a decree of the circuit court of the United States for the district of Illinois, rendered on or about the 9th day of June, A. D. 1846, in a certain suit then pending in said court, wherein the United States of America were plaintiffs and the said widow and heirs, among others, were defendants.

Deponent is credibly informed, and believes it to be a fact, that said defendant was, at the time of the commencement of this suit, in the occupancy of said premises as a tenant of Benson S. Scott, who claimed under said last-named widow and heirs at law derivatively.

THOMAS DENT.

Subscribed and sworn to before me this 14th day of December, A. D. 1877.

E. A. DRUMMOND,
U. S. Com.

(Endorsed.) Filed Dec. 14, 1877. Wm. H. Bradley, cl'k.

23 And thereupon the defendant then and there, for the purpose of showing under said section that he claimed title to said land through another source, read to the court the following affidavit:

United States circuit court, northern district of Illinois, ss.

MARIA L. DUNCAN, HARRIET B. COOLEDGE, and Helen Cooledge
vs.
HOWARD STEBBINS.
} Ejectment.

Richard Loyd, being duly sworn, says that he is the agent of the defendant in the above suit, and that said defendant claims title to the premises in controversy in said suit through a source other and different than that claimed by said plaintiffs, and other than that alleged by said plaintiffs to be the common source of title, which title so claimed by defendant is as follows: By patent from the United States to John J. Dunbar, dated January 6th, 1818; by deed from said Dunbar to John Frank, dated January 6th, 1818; by deed from the only heirs at law of John Frank, who died intestate, to wit, Mary Houston and John H. W. Frank, to Richard Loyd, dated January 21st, 1868; by deed from said Loyd to Benson S. Scott, with full covenants of warranty, dated December 9th, 1865, and by lease from said Benson S. Scott to said defendant, in force and
24 unexpired at the date of the commencement of this suit, under which lease, and by no other claim or title, was said defendant occupying said premises when he was served with the declaration and notice at the commencement of this suit.

RICHARD LOYD.

DISTRICT OF COLUMBIA,
City of Washington, ss:

I, R. J. Meigs, clerk of the supreme court of the Dist. of Columbia, the same being a court of record in and for said city, do certify that Richard Loyd, personally known to me to be the same person whose name is subscribed to the foregoing affidavit, appeared before me this day and subscribed said affidavit in my presence, and therefor being by me duly sworn according to law, deposed that said affidavit is true in substance and in fact; and I further certity that by the laws of the District of Columbia I am authorized to administer oathes.

Witness my hand and the seal of said court this 14th day of May, A. D. 1879.

[SEAL.]

R. J. MEIGS,
Clerk Sup. Court D. C.,
By M. A. CLANCY,
Ass't Clerk.

(Endorsed:) Filed June 10, 1879. Wm. H. Bradley, clerk.

And thereupon the plaintiffs, to maintain the issue on their part, read in evidence the following title papers, to wit:

1. A certified transcript from the records of Putnam County,
25 Illinois, of a deed from William Prout and wife to Joseph Duncan, dated May 2nd, 1834, recorded in said county October 29th, 1838, and conveying the premises in question to said Duncan in fee simple.

2. A certified copy of a decree in chancery in the United States circuit court for the district of Illinois, entered on June 9th, 1846, in a cause wherein the United States of America were complainants and Elizabeth C. Duncan, Mary Louisa Duncan, Ann Elizabeth Duncan, Joseph Duncan, Julia Smith Duncan, Hannah Caldwell Duncan, James M. Duncan, widow and heirs of Joseph Duncan, deceased, William Brown, Daniel C. Pierson, and William Thomas were defendants, in which decree the court found that said Joseph Duncan died siezed of certain lands, including the tract in controversy, and ordered a sale of said lands, and appointed William Thomas a commissioner to make such sale at public auction at such time and place as he should appoint, after giving at least six weeks' notice of each sale by publication in newspapers circulated in the counties in which the lands are situated, and with power to convey to the purchaser the lands so sold, but no deeds to be executed to the complainants except upon the order of the court. Also, a copy of the report of said commissioner, showing that on June 19th, 1846, he advertised the land described in the declaration in the Peoria Register, a newspaper published in Peoria County, Illinois, for sale at Peoria, in said last county, on August 11th, 1846, and sold the same on said day and at said place to the complainants, and conveyed the same on Aug. 12th, 1846, to the complainants, which report was made to the court on June 12th, 1847, but contained no statement that said newspaper circulated in Stark County, Illinois.

26 Also, a copy of the order of the court, entered June 17, 1847, confirming the sale and directing a delivery of the deed to the United States.

The plaintiffs proved, by oral evidence, that in 1846 the Peoria Register circulated generally in Stark County, Illinois.

It was admitted by the defendant that the original files and records in said chancery cause were destroyed in the great fire of October 8th and 9th, 1871, in Chicago, and that the original files and records in the present suit were also destroyed in said fire.

3. A certified copy of a deed, dated August 12th, 1846, executed by William Thomas, as commissioner under said decree, to the United States of America, recorded June 17, 1848, conveying in fee the land described in the declaration.

4. A certified copy of a deed dated December 28th, 1847, executed by

R. H. Gillett, Solicitor of the Treasury, on behalf of said United States, pursuant to an act of Congress, approved May 29th, 1830, recorded June 5th, 1848, and conveying the said land in fee to William W. Corcoran.

5. A certified copy of a deed, dated December 20th, 1867, from William W. Corcoran to William B. Morris, recorded March 12, 1868, conveying said land in fee.

6. The plaintiffs further offered in evidence the following written instrument, to wit, without accompanying or offering to accompany the same by evidence of the death of William B. Morris:

27 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss, Probate court:

I, John W. McKim, esquire, judge of the probate court within and for the county of Suffolk, hereby certify that Elijah George, esquire, whose signature is affixed to the annexed certificate and attestation, is the register and proper certifying officer of said court, and has, by law, the custody of the seal, and all the records, books, documents, and papers of or appertaining to said court, and that said certificate and attestation are in due form, and entitled to full faith and credit.

In witness whereof I have hereunto set my hand, this eleventh day of May, in the year of our Lord eighteen hundred and seventy-eight.

JOHN W. McKIM,
Judge of Probate Court.

28 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss, Probate court:

I, Elijah George, register of the probate court for said county of Suffolk, having, by law, the custody of the seal and all the records, books, documents and papers of or appertaining to said court and on file and of

X hereby certify the papers hereto annexed to be true copies of papers appertaining to said court.

the probate thereof and the letter testamentary thereon issued.

In witness whereof I have hereunto set my hand and the seal of said court, this eleventh day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] ELIJAH GEORGE,
Register.

29 I, William B. Morris, physician, of Boston, in the county of Suffolk and Commonwealth of Massachusetts, being of sound and disposing mind and memory, do make and publish this my last will and testament.

First. I hereby nominate and appoint Walter Hastings, of Boston, to be sole executor of this my last will and request; that he be exempted from giving sureties upon his bond as such, and I hereby request my said executor to pay all my just debts and funeral expenses out of my estate.

Second. I give and bequeath to my sister, Harriet B. Cooledge, the sum of ($800) eight hundred dollars.

To my sister, Maria L. Duncan, the sum ($1,500) fifteen hundred dollars.

To my sister, Julia H. Addison, the sum of ($800) eight hundred dollars.

To my sister, Elizabeth A. Fox, the sum of ($1,000) one thousand dollars.

To my sister-in-law, Caroline D. Morris, the sum of ($4,000) four thousand dollars.

To Mrs. Martha L. Downes, of Boston, the sum of two thousand ($2,000) dollars.

To Mrs. Francis P. Sherburne, of Boston, the sum of two thousand ($2,000) dollars.

To Mrs. Helen Crocker, of Boston, the sum of two thousand ($2,000) dollars.

I give and bequeath to Mrs. Laura Newcomb, of Providence, R. I., the sum of three hundred ($300) dollars; and to Miss Clara Mason, of said Providence, the sum of three hundred ($300) dollars.

30 In consideration of the devoted attention and kindness which I have received for many years from my friend, Mrs. Eliza Jane Nulter, wife of Benj. F. Nulter of said Boston, I give and bequeath to her the sum of one thousand ($1,000) dollars.

I give and bequeath to my friend, Walter Hastings, of said Boston, the silver pitcher presented to me by Dr. Bell.

I give and bequeath to my friend, John Kent, the sum of three hundred ($300) dollars, as a token of my regard and esteem for him.

I give and bequeath to my friend, Thomas M. Devens, of Boston, the clock which he gave to me, and associated as it is with a double memory, and to Paymaster James Hoy, U. S. N., the diamond pin which he gave to me on Christmas last.

I give and bequeath to Mrs. Nulter my dog named "Grip."

I give and bequeath to my nephew, Charles Morris, Lieut. U. S. A., my edition of Gordon's History of America.

I give and bequeath to my friend, Dr. Mason, two hundred dollars.

I give and bequeath to my friend, John H. Sherburne, of Boston, five hundred dollars.

All the rest and residue of my estate of which I may die seized or possessed, I give and bequeath to my sisters, Maria L. Duncan, Harriet B. Cooledge, and to Helen L. Cooledge, of Washington, D. C.

In testimony whereof I hereunto set my hand and publish and declare this to be my last will, in presence of the witnesses named below, this tenth day of March, A. D. 1878.

WM. B. MORRIS, M. D. [SEAL.]

31 Signed, sealed, published, and declared by the said William B. Morris as and for his last will and testament, in presence of us, who in his presence and in presence of each other, and at his request, have subscribed our names as witnesses hereto.

MARY A. NEWHALL.
MARY LAWLER.
ANNIE E. MATTSON.

32 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

At a probate court holden at Boston in and for said county of Suffolk, on the eighth day of April, in the year of our Lord one thousand eight hundred and seventy-eight.

On the petition of Walter Hastings, of said Boston, praying that the instrument therewith presented, purporting to be the last will and testament of William Bowen Morris, late of said Boston, deceased, may be proved and allowed, and letters testamentary issued to him, the executor therein named, without giving a surety or sureties on his official bond, and the heirs-at-law, next of kin, and all other persons interested having been duly notified according to the order of court, to appear and show cause, if any they have, against the same, and no party objecting thereto, and it appearing that said instrument is the last will and testament of said deceased, and was legally executed, and that said testator was at the time of making the same of full age and sound mind, and that said petitioner is a competent person to be appointed to said trust, it is therefore decreed that said instrument be proved, approved, and allowed as the last will and testament of said deceased, and letters testamentary be issued to said petitioner, he first giving bond without sureties for the due performance of said trust.

JOHN W. KcKIM,
Judge of Probate Court.

33 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss, Probate Court:

To Walter Hastings, of Boston, in said county, greeting:

[SEAL.] Trusting in your care and fidelity I, John W. McKim, esquire, judge of the probate court, in and for said county of Suffolk, by virtue of the power and authority vested in me, do hereby appoint you to be executor of the last will and testament of William B. Morris, late of said Boston, deceased, testate, which said will was proved and allowed on the eighth day of April, A. D. 1878, by said court, and is now of record in this court; and you are ordered to make and return into said probate court, within three months from the date hereof, a true inventory of all the real estate and all the goods, chattels, rights, and credits of said testator which are by law to be administered, and which shall have come to your possession or knowledge; to administer according to law and the will of the testator, all his goods, chattels, rights, and credits, and the proceeds of all his real estate that may be sold for the payment of his debts or legacies which come to your possession, or that of any other person for you; to render upon oath a just and true account of your administration at least once in each year from the date hereof, and at such other times as shall be required by said court. And also, within three months, to cause notice of your appointment to be published three successive weeks in the Daily Evening Traveller, a newspaper printed at said Boston, and within one year return your affidavit of having given such no-
34 tice, with a copy thereof, to the probate office of this county.

In witness whereof I have hereunto set my hand, and caused the seal of said court to be affixed, at Boston, this eighth day of April, in the year of our Lord one thousand eight hundred and seventy-eight.

JOHN W. McKIM,
Judge of Probate Court.

Countersigned.

ELIJAH GEORGE,
Register.

35 To the reading of which in evidence the defendant then and there objected, because said written instruments and each of them were not proved or certified to so as to entitle the plaintiff to read the same in evidence; because said written instruments and each of them were not competent evidence of the alleged death of said Morris, as against the defendant in this suit, were not the best evidence, were secondary evidence, and were not accompanied by any extraneous proof of such death, or any offer by the plaintiffs to otherwise prove such death, except by the contents of said written instruments; but the court overruled each of said objections and allowed said written instruments to be read in evidence, which was done, without there being at any stage of the trial any further evidence of said death, and the defendant then and there excepted to said decision of the court in admitting each of said instruments in evidence.

The plaintiffs further offered in evidence, in support of their claim, that the defendant claimed title from a common service the following title papers:

A certified copy of a power of attorney, dated August 23rd, 1864, from Elizabeth C. Duncan, Joseph Duncan, Julia S. Kirby and Edward P. Kirby, her husband, Mary L. D. Putnam and Charles E. Put-
36 nam, her husband, to Otis V. Turner, recorded in Stark County, Illinois, April 29, 1865, authorizing said Turner to sell and convey a certain tract of land, together with any and all other lands in the tracts appropriated for military bounties in the State of Illinois, which were purchased by or conveyed to Joseph Duncan, in his lifetime; to the reading of which in evidence the defendant objected, because said power was not accompanied with any evidence or offer to prove that said appointers, and particularly said Julia and Edward Kirby and Mary and Charles Putnam, were connected with or held title to said lands under the Joseph Duncan mentioned in said decree; but the court, without requiring or hearing other proof in that respect at any stage of the trial, overruled said objection and allowed said power to be read in evidence, which was done; to which ruling the defendant then and there excepted.

The plaintiffs further offered in evidence a certified copy of a deed, dated March 8th, 1865, from Elizebeth C. Duncan, widow, Joseph Duncan, Edward P. Kirby, and Julia S. Kirby, Charles E. Putnam, and Mary L. D. Putnam, by Otis A. Turner, their attorney in fact, to Richard Loyd, recorded in Stark County, Illinois, December 9, 1865, purporting to convey in fee the land described in declaration; to the reading of which in evidence the defendant objected, and assigned the same objections which were made to the reading of the power of attorney; but the court, without
37 any further proof being made, overruled said objections and allowed said deed to be read in evidence, which was done; to which ruling the defendant then excepted.

The plaintiffs then read in evidence a certified copy of a deed, dated December 9th, 1865, recorded in Stark County, Ill., Dec. 28th, 1868, from Richard Lloyd conveying in fee to Benson S. Scott, the land described in the declaration, also a stipulation of defendant's counsel, as follows:

38 United States circuit court, northern district of Illinois.

WILLIAM B. MORRIS
vs.
HOWARD STEBBINS. } Ejectment.

It is hereby stipulated that the defendant in said suit was, at the commencement of said suit and the time of service of process upon him, occupying the land described in the declaration only as the tenant of Benson S. Scott, his landlord, and at no time under any other claim; also that no objection will be made by the plaintiff on the trial of said cause to the introduction of a deed of said premises from R. Lloyd and others to said Scott on account of certain erasures appearing therein, proof to explain such erasures being hereby waived. The admissibility of said deed is not, however, conceded by the plaintiff, there being no waiver of any objection save as to said erasures.

April 17, 1878.

DENT & BLACK,
Plaintiffs' Att'ys.

39 The plaintiffs here rested.

The defendant, for the purpose of showing that he claimed title to the land through another and different source than that alleged by the plaintiffs, offered in evidence the title papers and testimony hereinafter mentioned, to the reading of which the plaintiffs objected, alleging that the defendant was estopped from so doing, which objection the court overruled and allowed said title papers and testimony to be read in evidence, which was done; to which decision the plaintiffs then and there excepted. Said title papers and testimony so offered and read in evidence by the defendant are as follows:

1. An exemplification of a patent issued by the United States of America to John J. Dunbar, granting the land described in the declaration in fee simple, and dated January 6th, 1818.

2. A certified copy of a deed from the records in the recorder's office of Stark County, Illinois—the county in which the land is situated—dated January 6th, 1818, from John J. Dunbar, conveying to John Frank in fee the said land, and recorded in said Stark County, June 18th, 1870, together with the certificates of acknowledgement and magistracy and recording thereto attached; which said documents and certificates are as follows:

40 [Filed June 18th, 1870.]

This indenture, made this sixth day of January, in the year of our Lord one thousand eight hundred and eighteen, between John J. Dunbar, late a private in Yeaton's company of artil'ery, party of the first part, and John Frank, of the city of Washington and District of Columbia, brickmaker, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of one hundred dollars, lawful money of the United States, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath given, granted, bargained, sold, remised, released, conveyed, and confirmed, and by these presents doth

give, grant, bargain, sell, remise, release, convey, and confirm, unto the said party of the second part, his heirs and assigns forever, all the following described land, situated, lying, and being in the tract set apart and appropriated by acts of Congress passed on and since the 6th day of May, 1812, for military bounties in the Territory of Illinois, to wit: the southeast quarter of section thirty-four of township twelve north, in range six east, containing one hundred and sixty acres. To have and to hold the said described premises, together with all the rights and privileges, unto the said party of the second part, his heirs and assigns, to his and their sole use and benefit and behoof forever. And the said party of the first part, for his heirs, executors, and administrators, by these presents, covenants, promises, and agrees to and with the said party of the second part, his heirs and assigns; that he, the said party of the first part and his heirs shall
41 and will warrant and forever defend the said described premises with the appurtenances hereby bargained and sold unto him, the said party of the second part, his heirs and assigns, from and against him, the said party of the first part, his heirs and assigns, and all persons claiming or who may claim the same.

In testimony whereof the said party of the first part hath hereunto set his hand and seal the day and year first above written.

JOHN J. DUNBAR. [SEAL.]

Signed, sealed and delivered in presence of—
THOMAS W. PAIRD.
BENJ. G. ORR.

DISTRICT OF COLUMBIA,
Washington County, to wit:

Be it remembered that on this sixth day of January in the year of our Lord one thousand eight hundred and eighteen, before the undersigned, two justices of the peace within and for the county of Washington and District aforesaid, personally appeared John J. Dunbar, party grantor, within named, and acknowledge' the within and foregoing instrument of writing to be his act and deed, and desired the same might be recorded as such.

JOSEPH FORREST, *J. P.*
JAMES M. VARNUM, *J. P.*

[Twenty-five cents United States internal-revenue stamp. S. B., April 1, 1865.]

42 DISTRICT OF COLUMBIA,
Washington County, to wit:

I, John A. Smith, clerk of the circuit court of the District of Columbia, for the county of Washington, hereby certify that Joseph Forrest and James M. Varnum, esquires, before whom the above and foregoing acknowledgment was made, were at the time thereof justices of the peace in and for the county and District aforesaid, duly commissioned and qualified; that their signatures thereto subscribed are genuine, and that the within deed is executed and acknowledged in conformity with the then existing laws of said District of Columbia.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 25th day of January A. D. 1858.

[SEAL.] JNO. A. SMITH, *Clk.*

STATE OF ILLINOIS,
Stark County, ss:

I, John M. Brown, clerk of the circuit court and ex-officio recorder within and for said county and State, do hereby certify that the foregoing is a full and correct copy of a deed from John J. Dunbar to John Frank, as the same appears of record in my office, and I further certify that said deed was filed and entered of record in my office on the 18th day of June, A. D. 1870.

Witness my hand and the seal of said circuit court this 17th day of September, A. D. 1870.

[SEAL.] JOHN M. BROWN, *Clerk.*

[Five cents int. rev. stamp. Sept. 17, 1870. J. M. B.]

43 3. An original power of attorney, dated November 21st, 1867, executed by John H. W. Frank and Mary Houston, children and sole surviving heirs at law of John Frank, deceased, to Francis M. Mills, empowering said Mills to sell and convey, by deed or otherwise, the land described in the declaration to such person and on such terms as he might deem expedient, which power of attorney purported to have been acknowledged on Nov. 21st, 1867, before the clerk of the county court of Breckinridge County, Kentucky, but is not of record; and in connection with said power and as auxiliary thereto, the defendant proved by the testimony of said Mary Houston that she is 68 years old, and resides in Louisville, Kentucky; is and was at the date of said power unmarried and a widow; that she married in Washington, D. C., on Sept. 5th, 1831, Dr. Robert Houston, who died on January 15th, 1865, in Breckenridge County, Kentucky; that her maiden name was Mary Frank; that her father's name was John Frank, and her mother's Mary Frank, nee Tuttle; that her father and mother, as the family register shows, were married on January 14th, 1810; that her mother died in 1835, and that her father died on September 23rd, 1825, in Washington City, D. C., and left no will; that he lived in said Washington City in January, 1818, and in fact lived there all his life; that his occupation there in 1818 was burning brick, and he was there also tax collector for several years; that she is a daughter of said John Frank, who had by his said marriage six children, four
44 of whom died in infancy; the oldest child was the witness herself, and the others were Elenor, John H. W., William, Catherine, and George Frank; that said Elenor, William, Catherine, and George died in infancy, intestate and unmarried; that said six children were the only children and heirs at law of said John Frank, deceased; that witness knew them all, and was with them in the family until the decease of said four; that said John H. W. Frank is her brother, and living, and she and he were raised together, and that since removing from Washington to Kentucky they have lived near each other in said Breckenridge County for the past 25 years, except during the last year she has lived in Louisville; that she and her said brother, John H. W. Frank, were the only surviving children of said John Frank at his decease; that said John Frank left him surviving no descendant of his other children; said four deceased children having died before him, in infancy, intestate and unmarried; that she and her brother, said John H. W. Frank, are the same Mary Houston and John H. W. Frank who executed and delivered said power of attorney

(which was exhibited to her) from Mary Houston and John H. W. Frank to Francis M. Mills, dated Nov. 21, 1867, authorizing a conveyance of the land in controversy; that the signatures of herself and her said brother thereto are their genuine signatures; that she signed the same and saw her said brother sign the same also, and that they both acknowledged the
45 execution of said power in the presence of each other and before the officer named in the certificate of acknowledgement; further, that her said father, John Frank, in his lifetime owned, and claimed to own, lands situated in the West, and in the military tract of Illinois, and that he bought many soldiers' claims to lands in the military tract.

4. An original deed, unrecorded, dated January 21st, 1868, executed by said John H. W. Frank and Mary Houston, only heirs at law of John Frank, deceased, late of Washington City, D. C., by Francis M. Mills, their said attorney in fact, to Richard Lloyd, conveying to said Lloyd, in fee simple, the land described in the declaration, and acknowledged January 24th, 1868.

5. An original deed, dated December 9th, 1865, executed by said Richard Lloyd, granting, bargaining, selling, and conveying to Benson S. Scott, said land, in fee simple absolute, by apt and proper terms to that effect, acknowledged Dec. 11th, 1865, and recorded in Stark County, Illinois, on Dec. 28th, 1868, which deed contained full covenants of warranty of the title to said land on the part of said Lloyd.

This is the same deed, a copy of the record of which had previously been offered and read in evidence on the part of the plaintiffs, as aforesaid.

6. A written stipulation, signed by the counsel of plaintiffs, to the effect that said defendant, Howard Stibbins, at the time of the
46 commencement of this suit was occupying the land described in the declaration only as the tenant of said Benson S. Scott, his landlord, and at no time under any other claim; this is the same stipulation above set forth in full.

The defendant here rested.

The plaintiff then, by way of rebuttal, offered in evidence the following written document, purporting to be a certified copy, to wit:

John J. Dunbar to William Prout.

Know all men by these presents that I, John J. Dunbar, of the county of Mathew and State of Virginia, for and in consideration of the full sum of eighty dollars, current money of the United States, to me truly paid on and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, do grant, bargain, sell, convey, and confirm unto William Prout, of Washington City, in the District of Columbia, his heirs and assigns forever, one hundred and sixty acres of land, which quantity of land is more fully described in the patent registered in volume 6, page 363, of the records of the General Land Office of the United States, and delivered to me by , a true copy of which is hereinafter contained, viz:

James Monroe, President of the United States of America, to all to whom these presents shall come, greeting:

47 Know ye that, in pursuance of the acts of Congress appropriating

and granting land to the late Army of the United States, passed on and since the sixth day of May, 1812, John J. Dunbar having deposited in the General Land Office a warrant in his favor, numbered 14234, there is granted unto the said John J. Dunbar, late a private in Kutse's company of artil'ery, a certain tract of land containing one hundred and sixty acres, being the southeast qr. of section thirty-four of township twelve north, in range six east, in the tract appropriated by the acts aforesaid for military bounties in the Territory of Illinois, to have and to hold the said qr. section of land, with the appurtenances thereof, unto the said John J. Dunbar and to his heirs and assigns forever.

In testimony whereof I have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, this sixth day of January, in the year of our Lord one thousand eight hundred and eighteen, and of the Independence of the United States of America the forty-second.

JAMES MONROE.

By the President:

JOSIAH MEIGS,
Commissioner of the General Land Office.

And the reversion and reversions, remainder and remainders, rents, issues, and profit of the aforesaid tract of land, and of every part thereof, and all my right, title, interest, claim, and demand of whatever nature,
48 of, to, and in the aforesaid one hundred and sixty acres of land, and any part and parcel thereof, in and by virtue of the aforesaid patent or otherwise. To have and to hold all the aforesaid described tra-t of land and every part and parcel thereof, with all the appurtenances and privileges thereunto belonging, to him, the said William Prout, his heirs and assigns, for his own proper use, benefit, and behoof forever, and to and for no other use, intent, or purpose whatever. And I, the said John I. Dunbar, for myself, my heirs, executors, and administrators, do covenant, promise, and agree to and with the said William Prout, his heirs, and assigns, that I am now the true, lawful, and rightful owner of all and singular the above-mentioned land, by virtue of the aforesaid recited patent, and also that he, the said William Prout, his heirs and assigns, shall and may at all times, forever hereafter, peaceably and quietly have, hold, occupy, possess, and enjoy, all and singular theland hereby bargained, sold, transferred, and assigned, without the lawful let, suit, trouble, hinderance, molestation, interruption, evi'tion, or disturbance of me, the said John J. Dunbarr, my heirs or assigns, or any other person or persons whatsoever; and that all and every person or persons, and his and their heirs, lawfully claiming any estate, right, title, or interest of, in, and to the said land herein described by, from, and under me, them or any of them, shall and will, from time to time, and at all times hereafter, upon the request and at the proper costs and charges in the law, of the said
49 William Prout, his heirs or assigns, make, do, sign, seal, and execute, or cause or procure to be made done, signed, sealed, and executed, all and every further and lawful act or acts, thing or things, device or devices, conveyance or conveyances, ap'u'rance or ap'ur'ances, in the law, whatsoever for the further, better, and more perfect granting, conveying, releasing, confirming, and assuring the premises aforesaid unto the said

William Prout, his heirs and assigns, and to his proper use and behoof forever, according to the true intent and meaning of these presents, and to and for no other use, intent, or purpose whatsoever; and I do hereby authorize and irrevocably empower the said William Prout, his heirs and assigns, to take possession of the aforesaid described tract of land, either in my name or his, or their name or names, as may be deemed best calculated to secure unto him or them, forever, the peaceable enjoyment thereof. And, lastly, I do appoint of within the Territory of my lawful attorney to make for me and in my name any further acknowledgement of this instrument of writing which may be deemed necessary in strict compliance with the laws of the said Territory of .

In witness of all the foregoing I have hereunto affixed my hand and seal, at Washington City, in the county of Washington and District of Columbia, this sixth day of January, one thousand eight hundred and eighteen.

JOHN I. DUNBAR. [SEAL.]

Signed, sealed, and delivered in the presence of—
SAMUEL N. SMALLWOOD.
JOSEPH CASSIN.

DISTRICT OF COLUMBIA,
County of , *ss:*

50 Be it remembered that on the this sixth day of January, 1818, the above-named John I. Dunbarr, who has signed, sealed, and delivered the above instrument of writing, personally came and appeared before us, the undersigned justices of the peace, and acknowledged in due form of law the same to be his free act and deed, for the purposes therein set forth, and also gave his consent that the same should be recorded whenever it might be deemed necessary. In witness of all which the said has hereunto affixed his name and has undersigned the same.

his
JOHN + I. DUNBARR.
mark.

Acknowledged before—
SAMUEL N. SMALLWOOD.
JOSEPH CASSIN.

I, John I. Dunbarr, do declare upon oath that I am the same person intended and named in the above deed, dated the sixth day of January, 1818, and more particularly in the patent therein recited at length, and further that I was duly placed in possession of the patent for the land conveyed in the above deed, by receiving the same from the General Land Office.

his
JOHN + J. DUNBARR.
mark.

Sworn and subscribed to before me this 7th day of January, 1818.
SAMUEL N. SMALLWOOD.

Received, this sixth day of January, 1818, from William Prout, the sum

of eighty dollars, being the consideration money expressed in the above deed.

his
JOHN + J. DUNBARR.
mark.

Witness:
JOSEPH CASSIN.

Recorded June 23rd, 1818.

51 STATE OF ILLINOIS,
Madison County, ss:

I, John D. Heisel, clerk of the circuit court and ex-officio recorder of deeds within and for Madison County, in the State of Illinois, do hereby certify the above and foregoing to be a true, perfect, and complete copy of an instrument of writing or deed of conveyance now appearing of record at my office in book E, pages 154, 155, and 156.

In witness whereof I have hereunto set my hand and affixed the seal of our said court, at office, in the city of Edwardsville, this third day of February, A. D. one thousand eight hundred and seventy-five.

[SEAL.] JOHN D. HEISEL, *Clerk.*

To the receiving and reading of which writing in evidence the defendant then and there objected, because said writing and purported deed was not proved or certified to so as to entitle the plaintiffs to read the same in evidence; because said purported deed was not acknowledged in fact; because the same had never been executed and acknowledged according to the laws of Illinois, or of the District of Columbia, and was not entitled to record in Illinois; because no certificate of magistracy had ever been attached to said purported deed so as to entitle such deed to record; because the purported official certificate to said written instrument at-
52 tached was not competent evidence of the alleged writing and the contents of the alleged record and memoranda to which such certificate purported to certify, nor of the facts in such certificate set forth, and was secondary evidence and unauthorized by any statute or any rule of practice; and because no foundation had been laid for the use of such copy, and from the defects patent on the face of said purported deed and acknowledgement could not be made.

The court, without passing at that time upon said objection, and not then admitting said writing, in evidence as a certified copy, permitted the plaintiffs, at their request, to make the following proofs:

And thereupon the plaintiffs proved, to wit:

1. By Mr. Dent, one of the plaintiffs' counsel, that said counsel had had in their possession, prior to the great fire of October 8th and 9th, 1871, in Chicago, an original deed corresponding substantially in contents to the writing offered in evidence, except that there was not attached to it the official certificate, dated Feb. 3rd, 1875; that he had not compared said offered copy with said original, but he believed from recollection that it corresponded with the original, and that he had not made said alleged copy; that said original deed had been sent to said counsel in behalf of Wm. B. Morris, the then plaintiff, for use in this suit, and had been offered in evidence on the first trial; that said original deed had been burned up in the Chicago fire of Oct. 8th and 9th, 1871; further that said original

53 deed had been sent to Washington, and attached as an exhibit to the original depositions of E. J. Middleton, and George Collard, hereinafter mentioned, had subsequently been detached therefrom by leave of the court, and returned to Washington for use in taking the deposition of Henrietta Boone, hereinafter set forth.

2. The plaintiffs further offered to read in evidence a copy of the original depositions of Erasmus J. Middleton and George Collard, taken de bene esse on September 21st, 1870, at Washington, D. C., before a notary public; to the reading of which copy in evidence the defendant objected, because the copy offered was secondary and not the best evidence; because it was not proven that said witnesses were dead or incompetent to testify, and that their depositions could not be retaken; because no reason was shown why their depositions could not have been retaken after the fire; because said copy has not been placed on file in this cause under any order of this court, nor restored to the files by any proceedings had under any statute of the United States, or of the State of Illinois; because said copy has no certificate thereto of its genuineness whatever, nor any certificate at all, and does not purport on its face to be a copy.

The facts in relation to said copy were admitted to be as follows: That it had been correctly copied by an attorney in the cause from the original depositions on file in the case; that the original depositions, 54 with the other files and records of the court, were burned up in the fire of October, 1871; that no general or special order had ever been made by the court authorizing the filing of said copy, as a substitute for said original depositions, and that no proceedings under any statute had been had for the purpose of restoring said original, but that after said fire the plaintiff's counsel had procured said copy from the then counsel of the defendant, and with his consent had placed it on file in this cause as a copy of the original depositions.

The court thereupon overruled each of said objections to the reading of said copy of the depositions, and permitted the contents of said copy to be read in evidence, which was done; to which decision of the court the defendant then and there excepted.

The contents of said copy so read were as follows:

That said Middleton and Collard had carefully examined the signatures of Samuel N. Smallwood on said original deed, purporting to be his, in three different places, and aver said signatures to be the genuine handwriting of said Samuel N. Smallwood; that said original deed is annexed to their depositions as Exhibit A; that one of said signatures appears as subscribing witness to the deed, another after the words "acknowledged before," and the third under the jurat to the oath attached to the deed; that 55 they were personally acquainted with Samuel N. Smallwood in his lifetime, and knew his handwriting, having often seen him write, and they have no hesitation in declaring said signatures to be his genuine signatures.

The plaintiffs further offered in evidence the deposition of Wm. W. Corcoran, taken Feb'y 24, 1875, as follows:

That he, Wm. W. Corcoran, resides in Washington, D. C.; that in 1847 he purchased from the United States, at a public sale made by the Solicitor of the Treasury, a large quantity of lands, including the land described in the declaration, for which lands he paid $22,000 into the U. S. Treas-

ury; that in 1848 he received a deed, dated Dec. 28th, 1847, for the tract in controversy from said Solicitor in the name of the United States, without notice of any adverse claim to said land; that he paid taxes on said land through agents for the years 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1865, 1866, 1867, and 1868, and until he conveyed the land to Wm. B. Morris, but which of his several agents paid said annual taxes he could not state; that he had various agents who paid taxes for him in Illinois, but that he confided that business to Anthony Hyde in Washington, and did not keep himself informed as to the agents elsewhere; that the original deed from William Thomas, commissioner to the United States, he sent to the plaintiff's counsel in Nov., 1869, and the original deed from the So-
56 licitor of the Treasury to himself he sent, in August, 1869, to an agent of his, for use in this suit; that he sent the original tax receipts for the years 1847 to 1864, inclusive, to his agent in October, 1869, and has not seen them since; that he made a written lease of the land in suit from Jan. 1st, 1859, to Jan. 1st, 1864, as his books show, and forwarded the same to his agent in October, 1869, since which time he has not seen it; that he paid 38 cents per acre for the land in suit, and knew of no adverse claim on said land until about the commencement of this suit; that he does not attend to the details of the business connected with his lands in Illinois, but has, since said lands were purchased until now, confided such details to said Hyde, his agent, and can only add that he bought said lands in good faith from the United States, and under the belief that the United States had removed all adverse claims, and under that belief had paid taxes and incurred other expenses from the date of the purchase until he sold the land in question to the plaintiff.

The defendant objected to and moved to exclude from the jury so much of said deposition as related to the payment of taxes, because it was apparent from the whole of said deposition, that said Corcoran had no personal knowledge of such payment of taxes, except from information of
57 his agents, and that such testimony was secondary, hearsay, and incompetent, unless coupled with the evidence of such agents, and because the tax receipts referred to by the witness were not properly proved and identified, and their contents established; but the court held that if the witness paid the tax moneys he would have some knowledge of the transaction, and therefore overruled said objections and allowed the whole of said deposition to be read in evidence, which was done; to which decision in admitting the portion objected to the defendant then and there excepted.

The plaintiffs further offered in evidence the deposition of Anthony Hyde, taken Feb. 24th, 1875, as follows:

That he resides in Georgetown, D. C., and is and has been since 1848 the business agent of W. W. Corcoran; that he knew of the purchase of the land in question by said Corcoran in 1847, and of the payment by Corcoran of $22,177.00 into the U. S. Treasury for this and other lands; that in Feb., 1848, he took charge of the deeds executed by the Solicitor of the Treasury to Corcoran, and has had charge of them since, and up to the present time has attended to all matters touching said lands, the payment of taxes, the appointment of agents under Corcoran's directions as to the lands in general, and the tract in suit, up to the time Corcoran

58 conveyed said tract to Wm. B. Morris; that he held the original deed from Gillett, the Solicitor, to Corcoran, and obtained for use in this suit from said Solicitor's office the original deed from Wm. Thomas, commissioner, to the U. S., which he sent to the plaintiffs' counsel in Nov., 1869; also sent to said counsel the original deed from John J. Dunbarr to Wm. Prout, which latter deed was first attached to the depositions of Erastus J. Middleton and George Collard, and forwarded to Chicago on or about Oct. 11, 1870, but was afterwards returned to obtain the deposition of Mrs. H. H. Boone, as to Joseph Cassin's signature, which deposition, with said deed attached to the same, was forwarded to the clerk of the U. S. circuit court on or about Jan. 26th, 1871.

That he has a rough memorandum of the testimony of said Henrietta H. Boone, which enables him to state that he exhibited to her the original deed from John J. Dunbarr to William Prout, when she testified that she lived in Washington; was then (in 1872) 59 years of age; was well acquainted with Joseph Cassin, formerly of Washington, who had died many years before; that she had many opportunities of becoming familiar with the handwriting of said Cassin, being intimately acquainted with his family, and having often seen him write, and having also his letters to the family, and that she was able to identify it; that she looked at said origi-

59 nal deed from Dunbarr to Prout and recognized as genuine the signature of Cassin in three places in said deed as a witness to Dunbar's signature; that in two of the places the signature which she recognized was written after that of Samuel N. Smallwood, and in another it stood alone as a witness to a receipt, and that from her personal recollection and from comparison of Cassin's signature, of undoubted genuineness, she was sure that the signatures on the deed purporting to be his were genuine. Said Hyde further testified that said original deed was attached to said Boone's deposition and sent to the clerk of the U. S. court at Chicago; further that he has been agent of said Corcoran since Feb., 1848, remaining in Washington during that time; that the principal agents through whom the taxes on the lands in question were paid lived in Illinois; that he had for a year or two paid them directly to the county officers, but he could not speak certainly, as the tax receipts which show who paid the taxes were burned, as he is informed, in the Chicago fire in 1871; that these receipts were for the years 1848 to 1863, inclusive, and 1865, 1866, and 1867, and were paid for by funds of Corcoran's; that he paid the taxes for Corcoran, in Stark County, Illinois, or had it done, for 1847 and 1864, but could not say whether the tract in controversy was included in the receipts for those years; that the land was leased to one Henry Graves

60 from Jan. 1st, 1859, to Jan., 1864, and the lease was sent to Corcoran's agent, S. L. Somers, in October, 1869; also the original tax receipts from 1847 to 1863, inclusive; that as far as he is aware Corcoran had no notice of any adverse claim to the land until about 1865.

The defendant objected to the reading in evidence of so much of said Hyde's testimony as related to the contents of the deposition of H. H. Boone, because it was incompetant and secondary evidence, because no foundation had been laid for such evidence, by proof that the said Boone was dead or otherwise incompetent to testify, or other reason shown why her deposition had not been retaken; and also objected to so much of said Hyde's testimony as related to the payment of taxes for other years than

1847 and 1864, because the same was hearsay, and was not coupled with or followed by the testimony of the parties actually making such payments, nor by proof of the contents of the tax receipts and of their authenticity; but the court overruled each of said objections, and permitted the whole of Hyde's testimony to be read in evidence, which was done to which decision overruling said objections and admitting in evidence, the portions of said testimony so objected to the defendant then and there excepted.

The plaintiffs then offered in evidence certain papers which were proved to have come to the plaintiffs' counsel from the hands of J. C. Conkling, and purported to be duplicate receipts for taxes on the lands in controversy for the years 1848, 1849, 1850, 1851, 1852, 1853, 1854,
61 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1865, 1866, 1867, 1868, and proved by a witness the signatures to four of said papers, to wit, the tax receipts for the years 1847, 1849, 1850, and 1851, but offered no evidence as to the signatures of the remainder of said papers, nor proof as to any official capacity of the signers of any of said papers; to the reading of which papers, and each of them, in evidence the defendant objected, because the handwriting of the person signing said papers, excepting said four papers, had not been proven, and because no proof that the alleged signers of any of said papers were acting under any official authority when the said papers were made; but the court overruled said objections, and without hearing further proof allowed said four receipts, the signatures to which were so proved, to be read in evidence, which was done; to which decision and admitting said papers in evidence the defendant then and there excepted.

Plaintiffs further offered in evidence a document purporting to be transcripts from the books kept by the collectors of taxes in Stark County, Illinois, for the years 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, and of the remarks written therein, in so far as the same related to the land in controversy. Each of the said transcripts was in the following general form (given here as a sample):

62 *List of lands and other real estate in the county of Stark and State of Illinois, subject to taxation for the year (here the year was inserted).*

Patentee's name.	Description.	Town.	Range.	Total value.	Total tax.	By whom paid.
John J. Dunbarr	S. E. 34	12 N.	6 E.	480	3.36	

63 Upon said transcripts, under the words "by whom paid," was written the following: On the transcript for 1847, the words "p'd by J. W. Henderson;" on the one for 1848, "p'd by C. and C.;" on the ones for 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1860, 1861, 1862, each, the words "p'd by J. C. Conkling;" on the one for 1859, the words "paid by J. C. Conkling, agent for W. W. Cameron;" on the one for 1863, the words "paid by W. W. Corcoran;" on the one for 1864, "paid by W. W. Corcoran, by J. C. Conkling."

Accompanying the said document, and the only proof offered in support thereof, was the following certificate attached thereto, the 18 sheets con-

taining said transcript being bound together and followed by said certificate, to wit:

STATE OF ILLINOIS,
Stark County, ss:

CLERK'S OFFICE, COUNTY COURT, TOULON, ILL.,
Feb'y 10th, 1875.

I, David J. Walker, clerk of the county court within and for the said county of Stark, in said State, do certify the annexed and foregoing sheets, eighteen in number, are respectively true copies of the titles of the collector's books of said county of Stark, containing the assessment of taxes on the southeast quarter of section numbered thirty-four, in township twelve, north of the base line, and range numbered six, east of the fourth principal meridian, for the years 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, and 1864; also the headings of said several books for the township in which said land is situated, and the amount of taxes assessed upon said land for the years above named, in consecutive order; also by whom said taxes
64 *taxes* were paid for said years, as appears from the said collector's books of said county, in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 10th day of February, A. D. 1875.

[SEAL.] DANIEL J. WALKER, *Clerk.*

To the reading of which transcripts in evidence, for the purpose of showing who paid said taxes for said years, the defendant objected, on the ground that said transcript was secondary, and not the best evidence, because there was no statute or other law requiring such entries to be made, and neither said transcripts nor the originals were competent evidence that the taxes were paid by the persons named in said entries; also because there was no evidence showing by whom and when said entries concerning payment were made, nor that the same were made by the collector of taxes, and also that said certificate was not competent evidence that such entries were made by the collector of taxes, and also that there was no statute authorizing such certificate nor the use, in evidence, of said certified copies, and particularly of said entries by whom paid, without further proof; but the court overruled said objections and admitted said documents in evidence without further proof than said certificate; to which decision of the court the defendant then and there excepted.

The plaintiffs further read in evidence a certified copy of a commission from President Monroe, attested by Rich'd Rush, Acting Sec. of State, and the seal of the U. S., dated April 30th, 1817, appointing Joseph Cassin justice of the peace in the county of Washington, in the
65 District of Columbia, until the end of the next session of the U. S. Senate and no longer; also a certified copy of a like commission, dated Sept. 1st, 1817, appointing Samuel N. Smallwood a justice of the peace of said county until the end of said session, and no longer.

The plaintiff rested.

The defendant then renewed his objections to the reading in evidence of the document purporting to be a copy of a deed from John J. Dunbarr to

William Prout, and also of the memoranda and statements purporting to have been thereon hereinbefore offered by the plaintiffs and set out at large, assigning the same objections as before; and also objected to the use of said certificate attached to said document from the recorder of Madison County for the purpose of showing that the original deed from said Dunbar to Prout and the endorsements thereon were ever recorded in said Madison County, because the said certificate was not competent evidence of such alleged recording nor of the contents of the alleged record of said deed and the writings thereon, nor of the time of filing such deed for record, nor of the facts alleged in said certificate; was secondary evidence, and unauthorized by any statute; and the defendant moved to exclude from the jury said document as evidence per se, and to exclude also the statement in said document, to wit, "Recorded June 23rd, 1818,"
66 and all other evidence in the case, oral or written, offered for the purpose of showing that said original deed had been recorded in Madison County, Illinois, because such statement and such evidence were incompetent, and not the best evidence to establish the fact—if so, of such recording; but the court overruled said objections and said motion, and allowed said document and endorsements and memoranda thereon to be read in evidence, and the oral and written testimony hereinbefore recited, and said document to be used as proof that said original deed had been recorded in said Madison County, without there being any further evidence in the case than is set forth in this bill; to which decisions of the court and each of them the defendant then and there excepted. The defendant also moved the court to exclude all of the evidence, oral and written, as to the contents of said alleged deed from Dunbar to Prout for the reason that no proof had been offered as to the genuineness of the signature of the alleged grantor therein, nor of his identity, but the court overruled the motion and allowed the same to be given in evidence without such proof, to which decision defendant then and there excepted.

The defendant then read in evidence the deposition of Henrietta H. Boone, taken at Washington, D. C., June 8th, 1875, by whom it was proved that she had lived in Washington since 1833; that she knew Joseph Cassin in his lifetime; that he was a purser in the Navy, and lived in Washington when she was a child; also in the navy yard at Gosport;
67 that he was her uncle, and that he died of yellow fever in 1822, near the Gulf of Mexico, while he was on duty as an officer of the Navy; that when he died she was about eight years old; that she has no recollection of ever having seen him write; she was too young; that she would not, of her own personal knowledge, know his handwriting; she only knew it by what she had been taught; that her deposition had been taken in this, about the year 1871; that her health then was weak, and she had had an attack of paralysis in December, 1870, which affected her mind and health for several months; that when her deposition was taken her mind and health were seriously affected by said attack; that said deposition was taken by Mr. Hyde, in Jan. or Feb., 1871, and she was not, when it was taken, in a condition to read papers and understand their contents; could understand what was read to her; that she saw an old deed at the time her deposition was taken, but did not read it; only heard it read; that she saw her uncle's signature to the deed, and compared it with a letter signed by him which she has, and which she has always heard

and believed to be his; that her health is now reasonably good, but when her deposition was taken by Mr. Hyde, in 1871, she sat propped up in a chair and was not able to read.

On cross-examination, she stated that Mr. Hyde exhibited to her an old deed, which she was informed was from Dunbar to Prout;
68 that Cassin's signature occurred on it once, but whether more than once she could not say; that the signature she compared with that to the letter, which was from her uncle, Joseph Cassin, to her father, and satisfied herself that the signature on the deed was his, and that she had no doubt then as to its genuineness.

On redirect examination she stated that she never saw the old deed but once, and then she could not read, though she could examine pictures and compare pictures or signatures.

It was proved that Henry Graves, to whom the alleged lease of the land described in the declaration was made by W. W. Corcoran, as stated by Corcoran, never did anything towards taking possession of said land, and never improved or commenced to improve said land at any time; that there was such a lease made out, but nothing was ever done under it by said Graves, or by any one in his behalf.

It was also proved by an old resident of Washington City, D. C., that he was well acquainted with one Joseph Cassin; that said Cassin, in 1817, 1818, and 1819, was a purser in the U. S. Navy, and that said Cassin was not a justice of the peace, and never acted as such, to his knowledge.

It was also proved by certified copies from the records in the Treasury and Navy Departments of the United States that the name of Joseph Cassin, lieutenant, was borne on the rolls of the U. S. sloop Peacock from Oct. 20, 1817, to Feb. 15, 1819; and that the log-book of said sloop shows that on Dec. 29th, 1817, she was in the harbor of Syracuse, and on Jan. 6, 1818, in the harbor of Messina, in the Mediterranean Sea. And the foregoing comprised all the evidence in the case.

And thereupon the court charged the jury as follows:

69 GENTLEMEN OF THE JURY: There are but two questions of fact to be left to you in this case.

This is an action of ejectment for the recovery of the southeast quarter of section thirty-four in township twelve north of range six east, situated in Stark County, in this State.

The plaintiffs, in order to show title, introduce a certified copy of a deed from the recorder's office of Stark County from one William Prout to Joseph Duncan, dated May 2, 1834, and conveying to Duncan the land in question. It then appears by a transcript of judgments rendered in this court, and proceedings had in this court, that the United States of America recovered a judgment against Joseph Duncan as surety of one William Linn, who was a government officer of some kind, in 1841; that subsequently a creditors' bill, or a chancery proceeding, for the purpose of getting at the property of Duncan, was filed in 1846, charging, in substance, the death of Joseph Duncan, the fact that he died indebted in a large sum to the United States upon this judgment, which was rendered against him as the surety of Linn; that he left certain children as his heirs and devisees, and a widow; that he also left a large amount of real estate,

70 and asking that this real estate be subjected to the payment of this debt.

In pursuance of the prayer of this bill, this court entered a decree, finding that the lands of which Duncan died seized, were liable for the payment of this judgment, and appointing William Thomas commissioner to make sale of this land, and Mr. Thomas in pursuance of this order and decree, proceeded to sell the lands which were described in the bill, and among others, the land in question, and the United States became the purchaser; which sale was subsequently approved by the court; and the deed which had been given by Thomas to the United States was thereby confirmed. Subsequently the United States, through its Solicitor of the Treasury, sold this land, with other lands, to William W. Corcoran, of Washington City, and Corcoran received the deed, a copy of which is put in evidence; and subsequently Corcoran conveyed the land in question to William B. Morris, who claimed to be the holder of this title at the time this suit was commenced.

71 Since the suit was commenced Mr. Morris has died, leaving a will, whereby he has devised this property to the plaintiffs, under the residuary clause therein.

This will was duly probated in Suffolk County, Massachusetts, where Mr. Morris was a resident, and certified copies of the probate of the will show sufficiently the right of these plaintiffs to recover in the suit, provided the defendant has not made out a defense.

It shows that the present plaintiffs, in other words, are the representatives of William B. Morris, and the recipients or persent holders of his title.

It is admitted that the files and records of this court were destroyed by the great fire of October 8th and 9th, 1871, and it is also proven that the original deeds, many of which were in the hands of the counsel, were destroyed in that fire; and therefore certified copies of those deeds have been introduced in evidence in place of the originals that were destroyed. That was a matter, however, for the court, and not for the jury.

72 I simply mention it in passing. The plaintiff also introduces evidence to show that on the 29th of April, 1865, the widow and heirs of Joseph Duncan, constituted one Otis Turner, their attorney in fact, to convey the land in question, with other lands belonging to Joseph Duncan, and that in pursuance of that conveyance Turner made a deed on the 8th of March, 1865, to Richard Lloyd of the land in question, and other lands, and that on the 9th of December, 1865, the same day the deed to him was recorded, Richard Lloyd made a conveyance of the land in question to Benson S. Scott; and it is stipulated that Benson S. Scott is the present holder of this title, and that the defendant Howard Stebbins, who was in possession of this property at the time this suit was commenced, was the tenant of Scott.

Upon this state of facts, or this showing of muniments of title, the plaintiffs would be entitled to recover as against the title of the defendant Stebbins, or against the landlord Scott; for the reason that the heirs of

73 Duncan are *a*stopped by the judicial proceeding in this court, and could not make a title to Lloyd, as against the title of the United States, which was derived under the proceedings of the decree of this court.

In other words, they cannot set up, after the proceedings in this court,

to which they were parties, a title; nor can any person derive a title from them in derogation of the title which has been given through this decree and these judicial proceedings. So that upon the showing made by the plaintiffs they would be entitled to recover—I speak now of the state of the proof at the time the plaintiff rested.

The defendant, however, introduces proof showing, or rather proof of, an independent title; that title consists of a copy of a patent made by the United States to John J. Dunbar, dated January 6th, 1818, and issued to him for his services in the war of 1812; and then a certified copy of a deed, made by John J. Dunbar to John Frank, dated January 6th, 1818, and recorded in Stark County, June 18th, 1870, and a deed from the heirs of John Frank to Lloyd, and a deed from Lloyd to Scott; so as to vest Scott with the title, or apparent title, of the original grantee from the United States, Dunbar, if these conveyances are not cut off.

In answer to this title thus set up, derived from Dunbar, the
74 plaintiff, by way of rebuttal, introduces a deed, or rather evidence of the existence of a deed, made by Dunbar to William Prout, on the 6th day of January, 1818, conveying the same land to Prout. You will bear in mind that the deed to Frank is dated the 6th day of January, 1818, and the deed to Prout from Dunbar is dated the 6th day of January, 1818.

The original deed from Dunbar to Prout was not so acknowledged, as to entitle it to record, but it was recorded in Madison County, in this State, which then included the present territory of Stark County, on the 23rd of June, 1818. That is the deed from Dunbar to Prout. Although not so acknowledged as to entitle it to record, it was actually put of record in Madison County on the 18th of June succeeding its execution.

The only significance of this record for the purpose of this case is notice to subsequent purchasers. If it had been properly acknowledged, then on the loss of the original the plaintiff could have obtained a certified copy and introduced it in evidence; but inasmuch as the deed was not properly recorded the plaintiff is obliged to rest for the evidence of the actual execution of the deed from Dunbar to Prout upon what we call secondary evidence, that is, the evidence of Mr. Dent that he had this deed in
75 possession; that it purported to be an original deed that it was witnessed by Smallwood and Cassin.

There is also evidence in the record, by the depositions of Middleton and Collard, copies of which are now on file, but the original depositions were destroyed by the fire, that before the deed was destroyed they inspected it, and knowing the handwriting of Smallwood, these witnesses testify unequivocally to Smallwood's handwriting as the attesting witness, or one of the attesting witnesses, of this deed. Mr. Dent then testifies to the existence of the deed, and that a copy which he has is substantially a copy of the original, which was destroyed in the great fire.

The title thus obtained under this deed to Prout is afterwards conveyed, as I have already shown you, by Prout to Duncan, and the case stands precisely in this way upon the record. Shall the title conveyed to Prout by the deed from Dunbar prevail as against the title conveyed to Frank by the deed from Dunbar to Frank? It appearing from the record that the Prout deed, that is, the deed from Dunbar to Prout, was recorded in Madison County, in this State, on the 23rd of June, 1818, and Duncan claim-

ing under Prout by a deed, executed in due form, and the plaint-
76 iffs holding now the Duncan title, I charge you that the plaintiffs are entitled to recover in this case.

The defendant, on the giving of such charge to the jury, objected, and excepted to that portion of the charge which stated that "Mr. Morris has died," and to that portion which stated "that certified copies of the probate of the will show sufficiently the right of these plaintiffs to recover in the suit, provided the defendant has not made out a defense;" and that "it shows that the present plaintiffs, in other words, are the representatives of William B. Morris."

The defendant also objected and excepted to that portion of said charge which stated that "The plaintiff also introduces evidence to show that on the 29th of April, 1865, the widow and heirs of Joseph Duncan constituted one Otis Turner their attorney in fact to convey the land in question, and that in pursuance of that conveyance Turner made a deed on the 8th of March, 1865, to Richard Lloyd, of the land in question." Also to that portion which stated that "Upon this state of facts, or this showing of muniments of title, the plaintiffs would be entitled to recover as against the title of the defendant Stebbins, or against his landlord Scott, for the reason that the liens of Duncan are estopped by the judicial proceedings in this court, and could not make a title to Lloyd as
77 against the title of the United States, which was derived under the proceedings of the decree of this court. In other words, they cannot set up, after the proceedings in this court to which they were parties, a title, nor can any person derive a title from them in derogation of the title which has been given through this decree and these judicial proceedings; so that upon the showing made by the plaintiffs they would be entitled to recover."

The defendant, on the giving of the charge, also objected and excepted to that portion which stated: "But it was recorded in Madison County, in this State, which then included the present territory of Stark County, on the 23rd of June, 1818. That is the deed from Dunbar to Prout. Although not so acknowledged as to entitle it to record, it was actually put of record in Madison County on the 23rd of June succeeding its execution."

The defendant then also objected and excepted to that portion of the charge which stated that "It appearing from the record that the Prout deed, that is, the deed from Dunbar to Prout, was recorded in Madison County, in this State, on the 23rd of June, 1818, and Duncan claiming under Prout by a deed executed in due form, and the plaintiffs holding now the Duncan title, I charge you that the plaintiffs are entitled to recover in this case."

77½ The jury thereupon returned a verdict of guilty, and finding an estate in fee in the plaintiffs in the land in suit.

And the defendant thereupon moved for a new trial, which was overruled, and judgment was entered upon the verdict for the plaintiffs, to all of which the defendants then and there excepted.

And as the foregoing facts do not appear of record, the defendant prays

that this his bill of exceptions be signed and sealed by the court, and made a part of this record; which is accordingly done.

H. W. BLODGETT, *Judge*. [SEAL.]

(Endorsed:) Filed July 18, 1879. Wm. H. Bradley, clerk.

78 And afterwards, to wit, on the 28th day of July, A. D. 1879, said defendant, by his attorneys, filed in said clerk's office his bond in said entitled cause, which said bond is in the words and figures following, to wit:

Bond.

Know all men by these presents that Howard Stebbins, as principal, and Andrew J. Scott and Benson S. Scott, as sureties, all of the county of Stark and State of Illinois, are held and firmly bound unto Maria L. Duncan, Harriet B. Cooledge, and Helen Cooledge in the penal sum of fifteen hundred (1,500) dollars, for the payment of which, well and truly to be made to the said Maria L. Duncan, Harriet B. Cooledge, and Helen Cooledge, their heirs, executors, administrators, or assigns, the said Howard Stebbins and the said sureties, his and their heirs, executors, and administrators do bind themselves, jointly and severally, and firmly by these presents. Witness the hands and seals of the said obligors this twenty-first day of July, A. D. 1879.

The condition of the above obligation is such that whereas the said Howard Stebbins has prosecuted a writ of error to the Supreme Court
79 of the United States to reverse the judgment rendered in the circuit court of the United States for the northern district of Illinois, at the July term, A. D. 1879, to wit, on the eighteenth day of July, A. D. 1879, thereof in a certain cause wherein said Maria L. Duncan, Harriet B. Cooledge, and Helen Cooledge were plaintiffs, and said Howard Stebbins was defendant.

Now, therefore, if the said Howard Stebbins shall prosecute his writ of error to effect, and if he fails to make his plea good, shall answer all damages and costs, then this obligation to be null and void; otherwise to remain in full force and effect.

HOWARD STEBBINS. [SEAL.]
A. J. SCOTT. [SEAL.]
B. S. SCOTT. [SEAL.]

United States circuit court, northern district of Illinois.

MARIA L. DUNCAN ET AL. vs. HOWARD STEBBINS. } Ejectment.

B. S. Scott and A. J. Scott, of Stark County, being duly sworn, depose that on the 25th day of July, 1879, he presented the annexed bond in the above cause, dated July 21, 1879, to Howard Stebbins, the principal, and A. J. Scott and Benson S. Scott, the sureties therein named, and said principal and sureties, each of them acknowledged to deponent their re-
80 spective signatures to said bond to be their genuine signatures, and said bond to be their act and deed as the same now is.

B. S. SCOTT.
A. J. SCOTT.

Subscribed and sworn to before me, a notary public of Stark County, Illinois, this 25th day of July, 1879.

[SEAL.] A. G. HAMMOND.

Approved.

H. W. BLODGETT, *J*

(Endorsed:) Filed July 28, 1879. Wm. H. Bradley, c'lk.

81 NORTHERN DISTRICT OF ILLINOIS, *sct:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Maria L. Duncan et al., devisees, &c., are the plaintiffs and Howard Stebbins is the defendant, as the same appears from the files and records of said court, now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this 30th day of September, A. D. 1879, and of our Independence the one hundred and fourth year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

82 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court between Maria L. Duncan, Harriet B. Coolidge, and Helen Coolidge, devisees of William B. Morris, deceased, plaintiffs, and Howard Stebbins, defendant, in an action of ejectment a manifest error hath happened, to the great damage of the said Howard Stebbins, as by his complaint appears, and it is being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf you are hereby commanded, if judgment be given therein, and then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1879, in the supreme court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, chief justice of the Supreme Court of the United States, this twenty-sixth day of July, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the 104th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsed:) Supreme Court of the United States. Maria L. Duncan et al. vs H. Stebbins. Writ of error.

83 United States of America to Maria L. Duncan, Harriet B. Cooledge, and Helen Cooledge, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, for the northern district of Illinois, wherein Howard Stebbins is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable judge of the northern district of Illinois this 28th day of July, A. D. 1879.

H. W. BLODGETT, *Judge.*

84 Received a true copy of the within citation this first day of August, 1879.

DENT & BLACK,
Att'ys for def'ts in error.

(Indorsed:) Duncan et al. vs. Howard Stebbins. Citation.

85 *Assignment of errors.*

In the Supreme Court of the United States, October term, A. D. 1879.

HOWARD STEBBINS
vs.
MARIA L. DUNCAN, HARRIET B. COOLEDGE, AND Helen Cooledge, devisees of William B. Morris, deceased.

In error to the circuit court of the United States for the northern district of Illinois.

And now comes the said plaintiff in error, by George O. Ide, his attorney, and says that in the record proceedings and judgment aforesaid there is manifest error in this, to wit:

1. That the circuit court erred in admitting, against the objections of the plaintiff in error, and allowing to be read to the jury as evidence of the death of Wm. B. Morris, the papers purporting to be a transcript of the will of said Morris, and the probate thereof, and the official certi-
86 ficates thereto attached, unaccompanied by other proof of such death, and without requiring better evidence.

2. The court erred in admitting in evidence, against the objections of the plaintiff in error, the certified copy of the power of attorney, dated August 23rd, 1874, from Elizabeth C. Duncan and others to Otis V. Turner, without requiring proof that the appointors, and particularly those of them named Julia Kirby, Edward Kirby, Mary Putnam, and Charles Putman, were connected with or held the title to the lands mentioned in said power, under the Joseph Duncan mentioned in the decree read in evidence.

3. The court erred in admitting in evidence, against the objections of the plaintiff in error, the certified copy of a deed dated March 8th, 1865, from Elizabeth Duncan, Joseph Duncan, Edward P. Kirby, Julia S. Kirby, Charles E. Putnam, and Mary L. D. Putnam to Richard Lloyd, without requiring other proof that said grantors, and particularly
87 said Edward P. Kirby, Julia S. Kirby, Charles E. Putnam, and Mary L. D. Putnam, were connected with said Joseph Duncan named in said decree, or held title to the land under him, and without identifying them as the legal heirs and representatives of said Duncan.

4. The court erred in admitting and allowing to be read in evidence against the objections of the plaintiff in error the certified copy of a document, purporting to be a deed from John J. Dunbar to William Prout, of the land in controversy, together with the certificates and memoranda contained in and accompanying said copy; and in overruling the specific objections made by the plaintiff in error to the use of said copy, as set forth in the bill of exceptions.

5. The court erred in overruling the motion of plaintiff in error to exclude from the jury the said certified copy of the document purporting to be a deed from John J. Dunbar to Wm. Prout; also in refusing to exclude from the jury the statement in said certified copy as to recording, and the other oral and documentary evidence, offered for the pur-
88 pose of showing a recording of said purported deed in Madison County; and erred in allowing said copy and the oral and written testimony objected to, to be read in evidence for the purpose of showing such recording; and erred also in not excluding the oral and written evidence adduced as to the contents of the original of said deed, and in admitting the same in evidence without requiring proof either as to the genuineness of the signature of the alleged grantor, or as to his identity.

6. The court erred in allowing the copies of the depositions of Erasmus J. Middleton and George Collard to be read in evidence against the objections of plaintiff in error.

7. The court erred in overruling the motion of plaintiff in error to exclude from the jury the portions of the deposition of W. W. Corcoran excepted to by the plaintiff in error.

8. The court erred in admitting in evidence against the objections of the plaintiff in error, the whole of the deposition of Anthony
89 Hyde, and in not excluding the portions of said deposition specifically objected to; and erred, also, in admitting in evidence the transcripts from tax books against the objections of the plaintiff in error, and in not excluding the portions thereof particularly excepted thereto on the trial.

9. The court erred in charging the jury as follows: "Mr. Morris has died," and "that certified copies of the probate of the will show sufficiently the right of these plaintiffs to recover in this suit, provided the defendant has not made out a defense;" and that "it shows that the present plaintiffs, in other words, are the representatives of William B. Morris."

10. The court erred in charging the jury as follows: "The plaintiff also introduces evidence to show that on the 29th of April, 1865, the widow and heirs of Joseph Duncan constituted one Otis Turner their attorney in fact to convey the land in question, and that in pursuance of

that conveyance Turner made a deed on the 8th of March, 1865, to Richard Lloyd of the land in question;" also, in charging that, "upon this state of facts, or this showing of muniments of title, the plaintiff
90 would be entitled to recover as against the title of the defendants Stebbins, or against his landlord, Scott, for the reason that the heirs of Duncan are estopped by the judicial proceedings in this court, and could not make a title to Lloyd as against the title of the United States, which was derived under the proceedings of the decree of this court; in other words, they cannot set up, after the proceedings in this court to which they were parties, a title, nor can any person derive a title from them in derogation of the title which has been given through this decree and these judicial proceedings, so that upon the showing made by the plaintiffs they would be entitled to recover."

11. The court erred in charging the jury as follows: "But it was recorded in Madison County, in this State, which then included the present territory of Stark County, on the 23d of June, 1818, that is, the deed from Dunbar to Prout; although not so acknowledged as to entitle it to record, it was actually put of record in Madison County on the 23d of June succeeding its execution."

91 12. The court erred in charging the jury as follows: "It appearing from the record that the Prout deed, that is, the deed from Dunbar to Prout, was recorded in Madison County, in this State, on the 23d of June, 1818, and Duncan claiming under Prout by a deed executed in due form, and the plaintiffs holding now the Duncan title, I charge you that the plaintiffs are entitled to recover in this case."

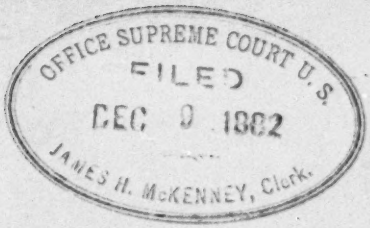
13. The judgment is erroneous in awarding damages against plaintiff in error.

Wherefore and for other errors, manifest and material, in said record and said judgment, said plaintiff in error prays that said judgment be reversed and he be restored, etc.

By GEORGE O. IDE,
Attorney for Pl'ff in Error.

(Indorsement on cover:) No. 153. Howard Stebbins, plaintiff in error, vs. Maria L. Duncan, Harriet B. Cooledge, & Helen Cooledge, devisees of William B. Morris, dec'd. N. Illinois C. C. U. S. Filed 26th November, 1879.

108-32



IN THE

SUPREME COURT of the UNITED STATES,

OCTOBER TERM, A. D. 1882.

HOWARD STEBBINS,
Plaintiff in Error,
v.
MARIA L. DUNCAN, HARRIET B. COOLEDGE AND HELEN COOLEDGE,
Defendants in Error.

Error to United States Circuit Court, Northern District of Illinois.

Brief and Argument for Plaintiff in Error.

GEORGE O. IDE,
ATTORNEY FOR PLAINTIFF IN ERROR.

PADDOCK & IDE,
OF COUNSEL.

PRESS OF BEACH, BARNARD & CO., 104 RANDOLPH STREET, CHICAGO.

IN THE

SUPREME COURT of the UNITED STATES,

OCTOBER TERM, A. D. 1882.

HOWARD STEBBINS,
Plaintiff in Error,
v.
MARIA L. DUNCAN, HARRIET B. COOLEDGE AND HELEN COOLEDGE,
Defendants in Error.

Error to United States Circuit Court, Northern District of Illinois.

STATEMENT OF CASE.

This was an action of ejectment, brought in the Circuit court by William B. Morris against the plaintiff in error, on September 12, 1869, for the recovery of a quarter section of land in Stark county, Illinois.

The declaration alleges the plaintiff Morris' possession and subsequent ouster as of the first day of April, 1869. (Rec., 3.) The original declaration and proof of its service, the bond for costs, and the defendant's plea having been burned in the fire of October, 1871, the court on November 16, 1872, entered an order substituting copies of these named papers, in lieu of the destroyed originals, and ruled the defendant to plead again. (Rec., 2–4.)

The case was tried on December 14, 1877, resulting in a verdict and judgment for the plaintiff Morris. (Rec., p. 5, folio 10–11; p. 6, fol. 13.) On March 27, 1878, this judgment was vacated, and a new trial granted. (Rec., 7; fol. 14.)

On January 22, 1879, counsel for Morris suggested the death of William B. Morris, and took leave to substitute as plaintiffs to the action the defendants in error. (Rec., 7; fol. 15.)

On June 10, 1879, the cause was again tried before the court and a jury, resulting in a verdict and judgment against the plaintiff in error. (Rec., 8, 9, 10.)

The errors assigned, and hereinafter specifically set out, relate to the rulings of the court on this last trial, in admitting or rejecting testimony, and in the charge to the jury. Objections, covering the points raised here, were duly and specifically made in the Circuit court at the time of the trial, and it so appears in the bill of exceptions.

At the commencement of the trial counsel for defendants in error filed an affidavit, claiming that both plaintiffs and defendant claimed title from a common source, viz., from Joseph Duncan. Under the 25th section of chapter 45, Rev. Statutes of Illinois, such an affidavit would have permitted the plaintiffs to show title from such common source, without introducing evidence of title from the original source, the United States, down to such common source, if the defendant had not by a similar affidavit then produced, shown that he also claimed title through a source other and different from the one claimed to be the common source. Such affidavit was filed by the defendant, and under the section of the statute referred to put the plaintiffs on proof of title from the patentee under the United States. (Rec., 10, 11.)

The Circuit court, disregarding this statute, permitted the plaintiffs to offer evidence of title from Joseph Duncan to themselves, and after requiring the defendant Stebbins to deraign title from the patentee from the United States to himself through a source distinct from Duncan, permitted the plaintiffs, by way of rebuttal or conclusion, t o supply the gap in their title between the patentee and Duncan by the introduction of the testimony set forth in the bill of exceptions.

This method of trying the case is referred to here for the purpose of explaining how it happened that the testimony appears in the bill of exceptions to have been offered in such an irregular and disconnected manner by the plaintiffs below, and to guard against misapprehension.

It appears from the record, when the evidence is placed in consecutive order, that the plaintiffs below, in order to establish title by deed to the premises in controversy, offered and read in evidence the following documents:

1. Exemplification of a patent issued by the United States of America to John J. Dunbar, granting the land described in the declaration in fee simple, and dated January 6, 1818, said exemplification being shown in the defendant, Stebbins', chain of title. (Rec., 17, fol. 39.)

2. A certified copy of a purported deed from John J. Dunbar to William Prout, conveying said land in fee, and purporting to have been dated January 6, 1818, said copy being certified to have been made on February 3, 1875. (Rec., 20, 21, 22, 23.)

3. A certified transcript from the records of Putnam county, Illinois, of a deed from William Prout to Joseph

Duncan, dated May 2, 1834, recorded October 29, 1838, conveying the land in fee. (Rec., 12, fol. 25.)

4. A certified copy of a decree in chancery entered in the United States Circuit court for the district of Illinois, in a cause wherein the United States were complainants, and the widow and heirs of Joseph Duncan were defendants, on June 9th, 1846; and of the proceedings under said decree, by virtue of which the premises in question were sold to the complainants. (Rec., 12, fol. 25.)

5. A certified copy of a purported deed dated August 12, 1846, purporting to have been made by William Thomas, a commissioner under said decree, to the United States, recorded June 17, 1848, conveying in fee the said premises in question.

6. A certified copy of a purported deed, dated December 28, 1847, recorded June 5, 1848, conveying in fee said premises and purporting to have been executed by R. H. Gillett, solicitor of the treasury, on behalf of the United States, pursuant to an act of congress, approved May 29, 1830.

7. A certified copy of a purported deed, dated December 20, 1867, recorded March 12, 1868, from William W. Corcoran to William B. Morris, and conveying said premises in fee. (Rec., 13.)

8. A document, purporting to be a certified copy of a will of William B. Morris, and of a probate thereof, before a probate court in Massachusetts, in which copy the names of Maria L. Duncan, Harriett B. Cooledge and Helen L. Cooledge appear as residuary devisees. No evidence of the death of said Morris, other than that furnished by said document, was offered at any stage of the trial or appears in the record. (Rec., 13, 14, 15, 16.)

Plaintiffs also read in evidence a certified copy of a commission, dated April 30, 1817, appointing Joseph Cassin justice of the peace of Washington county, D. C., until the end of the next session of the United States Senate; also a certified copy of a similar commission, dated September 1, 1817, appointing Samuel N. Smallwood a justice for the same period. (Rec., 28, fol. 65.)

The plaintiffs further offered and read in evidence, for the purpose of showing that the defendant, Stebbins, claimed title from the common source, Duncan, the following documents:

1. A certified copy of a power of attorney, dated August 23, 1864, purporting to have been made by Elizabeth C. Duncan, Joseph Duncan, Julia S. Kirby and Edward P. Kirby, Mary L. D. Putnam and Charles E. Putnam, to Otis V. Turner, recorded April 29, 1865, authorizing appointee to sell the land in controversy. (Rec., 16, fol. 36.)

2. A certified copy of a purported deed from said appointors by their said appointee to Richard Lloyd, conveying said premises, dated March 8, 1865, and recorded December 9, 1865. (Rec., 16, fol. 36.)

3. A certified copy of a deed of said premises, dated December 9, 1865, recorded December 28, 1868, from Richard Lloyd to Benson S. Scott. (Rec., 16, fol. 37.)

4. An admission of the defendant, Stebbins, that at the time the suit was begun, he was occupying the land in question, as the tenant of Benson S. Scott. (Rec., 17, fol. 38.)

The defendant, on the trial and in due season, made specific objections to the introduction of said documentary

evidence, for the reasons hereinafter stated. The exceptions to the overruling of these objections and to admitting the evidence are duly preserved in the record.

These objections are as follows:

I.

TO THE CERTIFIED COPY OF A DEED FROM DUNBAR TO PROUT.

Because said copy of said purported deed was not proved or certified to so as to entitle the plaintiff to read the same in evidence. Because said purported deed was not acknowledged in fact. Because said deed had never been executed and acknowledged according to the laws of Illinois, or of the District of Columbia, in which district it purports to have been made, and was not entitled to record in Illinois. Because no certificate of magistracy had ever been attached to said purported deed so as to entitle such deed to record. Because the purported official certificate to said copy was not competent evidence of the alleged writing, and of the contents of the alleged record and memoranda to which such certificate purported to certify, nor of the facts in such certificate set forth, and was secondary evidence and unauthorized by any statute or any rule of evidence. Because no foundation had been laid for the use of such copy, and from the defects patent on the face of said purported deed and acknowledgment, could not be made. (Rec., 23, fol. 52.)

The court, without passing upon these objections and not then admitting said copy, permitted the plaintiffs to introduce the oral evidence of T. Dent; a copy of depositions of Middleton and Collard, the original depositions

of William W. Corcoran and A. Hyde, and sundry copies of tax receipts. (See Record, pages 23, 24, 25, 26, 27, 28.)

Defendant then renewed the above objections to the reading in evidence of said alleged copy of a deed from Dunbar to Prout, and of the memoranda and statements purporting to have been thereon, alleging the same objections as above specifically stated. (Rec., pages 28, 29; fol., 65.)

Defendant also objected to the use of said certificate, attached to said document from the recorder of Madison county, for the purpose of showing that the original deed from said Dunbar to Prout, and the endorsements thereon, were ever recorded in said Madison county; because said certificate was not competent evidence of such alleged recording, nor of the contents of the alleged record of said deed and the writings thereon, nor of the time of filing such deed for record, nor of the facts alleged in said certificate. Because said certificate was secondary evidence, and not authorized by any statute. (Rec., 29; fol., 66.)

And defendant moved to exclude from the jury said document as evidence *per se*, and to exclude also the statement in said document, to wit: "Recorded June 23, 1818," and all other evidence in the case, oral or written, offered for the purpose of showing that said original deed had been recorded in Madison county, Illinois, because such statement and such evidence were incompetent, and not the best evidence to establish the fact, if so, of such recording. (Rec., 29; fol., 66.)

The court overruled all the objections and the motion of defendant to exclude, and allowed said document and

endorsements and memoranda thereon and the oral and written testimony of Dent and others, above referred to and contained in the printed record from page 23 to 28, both inclusive, to be read in evidence, and allowed said document to be used as proof that said original deed had been recorded in said Madison county, without there being any further evidence in the case concerning the same than is above recited. (Rec., 29; fol., 66.)

The document referred to is the purported copy of the alleged deed from Dunbar to Prout, the certificates and memoranda attached, and the certificate of said copy made by the recorder of Madison county on February 3, 1875, as shown in the printed record from page 20, folio 46, to page 23, folio 51, both inclusive.

To each of these decisions the defendant then and there excepted. (Rec., 29, fol. 66.)

Defendant also moved the court to exclude all of the evidence, oral and written, as to the contents of said alleged deed from Dunbar to Prout, for the reason that no proof had been offered as to the genuineness of the signature of the alleged grantor, Dunbar, nor of his identity. Motion overruled, and said contents allowed to be given in evidence without such proof, and exceptions taken and preserved. (Rec., 29, fol. 66.)

Defendant also objected to the reading in evidence of the copy, when offered, of the original depositions of Middleton and Collard taken *de bene esse*, on September 21, 1870, at Washington, D. C., because the copy offered was secondary, and not the best evidence. Because it was not proven that said witnesses were dead or incompetent to testify, and that their depositions could not be re-taken. Because no reason was shown why their depo-

sitions could not have been re-taken after the fire. Because said copy had not been placed on file in this cause under any order of the court, nor restored to the files by proceedings had under any statute of the United States, or of the State of Illinois. Because said copy has no certificate thereto of its genuineness, nor any certificate at all, and does not purport, on its face, to be a copy. (Rec., 24, fol. 53.)

The facts in relation to this copy of Middleton and Collard's depositions, were admitted to be as follows: That it had been correctly copied by an attorney in the case from the original depositions on file in the case; that the original depositions with the other files and records of the court were burned up in the fire of October, 1871; that no general or special order had ever been made by the court, authorizing the filing of said copy, as a substitute for said original depositions, and that no proceedings under any statute had been had for the purpose of restoring said original, but that after said fire, the plaintiffs' counsel had procured said copy from the then counsel of the defendant, and with his consent had placed it on file in this cause as a copy of the original depositions. (Rec., 24, fol. 54.)

The court overruled each of said objections, and permitted the contents of said copy, as set forth on page 24, fol. 55 of the record, to be read in evidence, to which decision defendant excepted. (Rec., 24, fol. 54.)

Defendant objected to, and moved to exclude from the jury so much of Corcoran's deposition as related to the payment of taxes, because it was apparent from the whole of the deposition that Corcoran had no personal knowledge of such payment, except from information from his

agents, and because his testimony in this regard was secondary, hearsay and incompetent, unless coupled with the evidence of such agents, and because the tax receipts referred to by him were not properly proved and identified and their contents established; but the court overruled the objections, and allowed the whole of Corcoran's deposition to be read in evidence; to which decision in admitting the portion of the deposition objected to, defendant excepted. (Rec., 25; fol. 57.)

Defendant also objected to the reading in evidence of so much of Anthony Hyde's deposition as related to the contents of the deposition of Henrietta H. Boone, because it was incompetent and secondary evidence; because no foundation had been laid for such evidence, by proof that Boone was dead or otherwise incompetent to testify, or other reason shown why her deposition had not been retaken. Defendant also objected to so much of Hyde's deposition, as related to the payment of taxes for other years than 1847 and 1864, because Hyde's testimony in this respect was hearsay, and was not coupled or followed by the testimony of the parties actually making such payments, nor by proof of the contents of the tax receipts and of their authenticity. The objections were overruled, and the portion of Hyde's deposition objected to admitted in evidence, and exception to this ruling taken by defendant. (Rec., 27; fol. 60.)

Defendant also objected to the admission of the tax receipts specified in the record, without proof of any kind of the signatures of the persons making the same, nor of the official capacity of the signers, because the handwriting of the said signers had not been proven, and because their official authority to make said papers was not shown. Objections overruled, and papers objected to

admitted in evidence without such proof. Exception by defendant. (Rec., 27; fol. 61.)

Defendant also objected to the reading in evidence of a purported transcript from certain books kept by collectors of taxes in Stark county, Illinois, for certain years; and of remarks and entries therein, offered for the purpose of showing by such remarks who paid taxes on the land in suit; and objected thereto on the grounds that said transcript was secondary and not the best evidence; because there was no statute or other law requiring such entries to be made; that neither the said transcripts nor the originals thereof were competent evidence that the taxes were paid by the persons named in such entries; also, because there was no evidence showing by whom and when said entries concerning payment were made, nor that such entries were made by the collector of taxes; also, because said certificate attached to the transcript was not competent evidence that such entries were made by the collectors of taxes; also, because there was no statute authorizing such certificate, nor the use in evidence of said certified copies, and particularly of said entries, "by whom paid," without further proof.

Objections overruled and transcripts admitted in evidence without other proof than said certificate. Exceptions taken by the defendant. (Rec., p. 28, fol. 64.)

II.

DEFENDANT'S OBJECTION TO THE DOCUMENT PURPORTING TO BE A COPY OF THE WILL OF WILLIAM B. MORRIS, AND ITS PROBATE.

This document consists of an authenticated copy, as stated in the register's certificate, of the last will and testament of William B. Morris, deceased, the probate thereof, and the letters testamentary issued thereon. (Rec., 13, 14, 15.)

There is no finding or adjudication in this record of the Probate court, that William B. Morris was dead. It shows that the court simply admitted the will to probate, and issued letters testamentary. (Rec., 15.)

The bill of exceptions shows that the plaintiffs offered this document in evidence without accompanying or offering to accompany the same by evidence of the death of William B. Morris. (Rec., p. 13, fol. 27.)

The bill of exceptions further shows, that the defendant objected to the reading of this document in evidence, for the following stated reasons:

Because said written instruments and each of them were not competent evidence of the alleged death of said Morris, as against the defendant in this suit; were not the best evidence; were secondary evidence, and were not accompanied by any extraneous proof of such death, or any offer by the plaintiffs to otherwise prove such death, except by the contents of said written instruments. (Rec., 16; fol. 35.)

The court overruled each of said objections and al-

lowed said written instrument to be read in evidence, *without there being at any stage of the trial any further evidence of said death.* To this decision defendant excepted. (Rec., 16; fol. 35.)

III.

DEFENDANT'S OBJECTIONS TO THE COPIES OF THE POWER OF ATTORNEY AND DEED.

Because the same were not accompanied with or followed by any evidence or offer to prove, that the appointors or grantors in said instruments, and particularly Edward and Julia Kirby and Charles and Mary Putnam, were connected with or held title to the land under the Joseph Duncan, mentioned in the decree read in evidence. Objections overruled and exceptions. (Rec., 16; fol. 36–37.)

DEFENDANT'S TITLE AND PROOFS.

Defendant showed title to the land in controversy through another and different source from the patentee than that under which the plaintiffs claimed title, and distinct also from the alleged common source, Duncan.

The title papers and testimony read in evidence for the defendant, are as follows:

1. An exemplification of a patent, issued by the United States of America, granting in fee to John J. Dunbar the land described in the declaration, and dated January 6, 1818. (Rec., 17, fol. 39.)

2. A duly certified copy from the recorder's office of Stark county, Illinois, in which county the land is situated, of a deed dated January 6, 1818, from John J. Dunbar to John Frank, conveying said land in fee, and recorded in said Stark county June 18, 1870, and of the certificates of acknowledgment and magistracy and recording thereto attached. The certificate of acknowledgment certifies that Dunbar acknowledged the deed on January 6, 1818, before two justices of the peace of Washington county in the District of Columbia, and the clerk of the Circuit court of said district certifies, on January 25, 1858, that said justices were such, at the date of said acknowledgment, that their signatures to the certificate of acknowledgment are genuine, and that the deed is executed and acknowledged in conformity with the then existing laws of said district. (Rec., 17, 18.)

3. An original power of attorney, dated November 21, 1867, executed by John H. W. Frank and Mary Houston, children and sole heirs at law of said John Frank, to Francis M. Mills, authorizing a sale and deed of the land in controversy, and acknowledged in Breckenridge county, Kentucky. (Rec., 19, fol. 43.)

In connection with this document, it was proved by said Mary Houston that John Frank lived, in January, 1818, in Washington City, D. C., and died there intestate on September 23, 1825; that he, in his lifetime, owned and claimed to own land in the military tract of Illinois; that she and John H. W. Frank are the lawful children and only heirs at law of said John Frank, were at his death his only surviving heirs, and since removing from Washington, D. C., they have lived in Kentucky, for the past twenty-five years; that she married in 1831 at Washing-

ton, D. C., Dr. Robert Houston, who died in 1865, in Breckenridge county, Ky.; that at the date of the above power of attorney she was a widow and not remarried; that she and her brother, said John H. W. Frank, signed and delivered the above power of attorney to Mills, and acknowledged the same, as stated in the certificate. (Rec., 19, 20.)

4. An original deed, dated January 21, 1868, executed by said John H. W. Frank and Mary Houston, only heirs at law of John Frank, deceased, late of Washington City, D. C., by said Francis M. Mills, their attorney in fact, to Richard Lloyd, conveying the land in suit in fee, and acknowledged January 24, 1868. (Rec., 20, fol. 45.)

5. An original warranty deed, dated December 9, 1865, executed by Richard Lloyd, conveying said land to Benson S. Scott, acknowledged December 11, 1865, and recorded in Stark county, Illinois, December 28, 1865. (Rec., 20, fol. 45.)

6. Plaintiffs' stipulation that defendant Howard Stebbins was occupying the land in suit, when the suit was begun, under said Benson S. Scott, and as his tenant only, and at no time under any other claim. (Rec., 20, fol. 46.)

No exceptions were taken to the introduction of the defendant's title papers, by the plaintiffs, for want of sufficient proofs.

Defendant read in evidence also, the deposition of Henrietta H. Boone, taken at Washington, June 8, 1875, rebutting the statements alleged by A. Hyde in his deposition to have been testified to by her. (Rec., 29, fol. 67.) Also, the testimony of an old resident of Washington, D.

C., that Joseph Cassin, in 1817, 1818 and 1819, was not a justice of the peace, but was a purser in the navy. (Rec., 30, fol. 68.) And also proved by the records in the treasury and navy departments that Joseph Cassin's name was borne as lieutenant on the rolls of the United States sloop Peacock from October 20, 1817, to February 15, 1819; and by the log book of said sloop that on December 29, 1817, she was in the harbor of Syracuse, and on January 6, 1818,—the date of the deed from Dunbar to Prout, in plaintiffs' claim of title, and when Joseph Cassin purports to have witnessed the same,—was in the harbor of Messina, in the Mediterranean sea. (Rec., 30, fol. 68.)

The bill of exceptions recites that it contains all the evidence in the case. (Rec., 30, fol. 68.)

The verdict and judgment find an estate in fee simple in the plaintiffs, MARIA L. DUNCAN, HARRIET B. COOLEDGE and HELEN COOLEDGE, and the judgment for the recovery of the land by them from the defendant is entered in their names and favor.

Assignment of Errors.

In the Supreme Court of the United States—October Term, A. D. 1882.

Howard Stebbins, *Plaintiff in Error*,
vs.
Maria L. Duncan, Harriet B. Cooledge and Helen Cooledge, *Defendants in Error*.

In error to the Circuit court of the United States for the northern district of Illinois.

And now comes the said plaintiff in error, by George O. Ide, his attorney, and says that in the record, proceedings and judgment aforesaid, there is manifest error in this, to wit:

1. That the Circuit court erred in admitting and in allowing to be read to the jury, against the objections of the plaintiff in error, as evidence of the death of William B. Morris, the papers purporting to be a transcript of the will of said Morris, the probate thereof and the letters testamentary issued thereon, with the official certificates thereto attached, without being supported by other proof of such death, and without requiring extraneous and other evidence of such death.

(For probate transcript see printed Record, 13, 14, 15, and for exceptions and objections, p. 16, fol. 35.)

2. The court erred in charging the jury as follows: "Since the suit was commenced, Mr. Morris has died, "leaving a will whereby he has devised this property to "the plaintiffs, under the residuary clause therein;" and "that certified copies of the probate of the will, show sufficiently the right of these plaintiffs to recover in this "suit, provided the defendant has not made out a defense;" and that "it shows that the present plaintiffs, "in other words, are the representatives of William B. "Morris, and the recipients or present holders of his "title;" and erred also in not charging the jury, in the absence of other evidence than the probate record, to find for the defendant.

(Charge of court, printed Rec., 31, fol. 71.)

3. The court erred in admitting and allowing to be read in evidence, against the objections of the plaintiffs in error the certified copy of a document, purporting to be a deed from John J. Dunbar to William Prout, with the certificates and memoranda contained in and accompanying such copy; and in overruling the specific objections made by plaintiff in error to the use in evidence, of said copy and the clerk's certificate thereto, as set forth in the bill of exceptions.

(For copy of deed and certificates, see printed Rec., 20, 21, 22; objections and exceptions, pages 23, 28, 29, fol. 52, 65, 66.)

4. The court erred in overruling the motion of plaintiff in error to exclude from the jury the said copy and the clerk's certificate thereto, of said alleged deed from John J. Dunbar to William Prout; also in refusing to exclude from the jury the statement in said certified copy as to recording, to wit, "Recorded June 23d, 1818," and

the other oral and documentary evidence, offered for the purpose of showing a recording of said purported deed in Madison county; and erred in allowing said copy and the clerk's certificate thereto, and the oral and written testimony objected to, to be read in evidence for the purpose of showing such recording; and erred also in not excluding the oral and written evidence adduced as to the contents of the alleged original of said deed, and in admitting the same in evidence without requiring proof either as to the genuineness of the signature of the alleged grantor, Dunbar, or as to his identity.

(For objections and motion see pages 23, 29, printed record.)

5. The court erred in charging the jury as follows:

"But it was recorded in Madison county, in this state, "which then included the present territory of Stark "county, on the 23d day of June, 1818—that is, the deed "from Dunbar to Prout. Although not so acknowledged "as to entitle it to record, it was actually put of record in "Madison county on the 23d day of June succeeding its "execution."

(See charge, page 32, folio 74, printed record; exception, page 33, folio 77.)

6. The court erred in charging the jury as follows:

"It appearing from the record that the Prout deed, "that is, the deed from Dunbar to Prout, was recorded "in Madison county, in this state, on the 23d day of "June, 1818, and Duncan claiming under Prout by a deed "executed in due form, and the plaintiffs holding now "the Duncan title, I charge you that the plaintiffs are en-"titled to recover in this case."

(See charge, printed record, page 32, folios 75, 76; exception, page 33, folio 77.)

7. The court erred in allowing the copies of the depositions of Erasmus J. Middleton and George Collard to be read in evidence against the objections of plaintiff in error, as set forth in the bill of exceptions.

(For copies see printed record, page 24, fol. 53, 55; objections and exceptions, 25; folios 53, 54.)

8. The court erred in not excluding from the jury the portions of the deposition of W. W. Corcoran, objected to by the plaintiff in error, and in overruling the motion to exclude the same.

(Printed record, page 25, folio 56; objections and motion, page 25, folio 57; statement, *ante*.

9. The court erred in admitting in evidence against the objections of the plaintiff in error, the whole of the deposition of Anthony Hyde, and in not excluding the portions of said deposition specifically objected to concerning the contents of a deposition of one H. H. Boone, and concerning the payment of taxes, as set forth in the bill of exceptions; and erred also in admitting in evidence the transcript from tax books, against the objections of plaintiff in error, and in not excluding the portions thereof particularly excepted to on the trial.

(For part objected to, objections and exceptions, see printed record, 26, 27, 28, folios 58, 59, 60, 61, 64.)

10. The court erred in admitting in evidence, against the objections of the plaintiff in error, the certified copy of the power of attorney, and the certified copy of a deed, and each of them, the former purporting to have

been made by Elizabeth Duncan, Joseph Duncan, Edward P. Kirby, Julia S. Kirby, Charles E. Putnam and Mary L. D. Putnam to Otis V. Turner, and the latter purporting to be a deed from said appointers by their said appointee to Richard Lloyd, without requiring proof that said grantors, and particularly said E. P. Kirby, Julia S. Kirby, Charles E. and Mary L. D. Putnam, were connected with the Joseph Duncan, deceased, mentioned in the decree, or held title under him, and without identifying them as the legal heirs and representatives of said Duncan, or as being the parties to said decree.

(For documents, objections and exceptions, see Printed Rec., p. 16, fols. 36, 37.)

11. The court erred in charging the jury as follows: "The plaintiff also introduced evidence to show that on "the 29th of April, 1865, the widow and heirs of Joseph "Duncan constituted one Otis Turner their attorney in fact "to convey the land in question, and that in pursuance of "that conveyance Turner made a deed, on the 8th of "March, 1865, to Richard Lloyd, of the land in question;" also, in charging that "upon this state of facts, or this "showing of muniments of title, the plaintiffs would be "entitled to recover, as against the title of the defendant, "Stebbins, or against his landlord, Scott, for the reason "that the heirs of Duncan are estopped by the judicial "proceedings in this court, and could not make a title to "Lloyd, as against the title of the United States, which "was decreed under the proceedings of the decree of this "court; in other words, they cannot set up, after the pro-"ceedings in this court, to which they were parties, a "title, nor can any person derive a title from them in "derogation of the title which has been given through

" this decree and these judicial proceedings, so that, " upon the showing made by the plaintiffs, they would " be entitled to recover.

Pr. Rec., p. 31, fols. 72, 73; exceptions, p. 33, fol. 77.

12. The court erred in overruling the motion for a new trial, and in rendering judgment on the verdict for defendants in error.

P. Rec., pp. 9, 10.

Wherefore, and for other errors, manifest and material, in said record and said judgment, said plaintiff in error prays that said judgment be reversed, and he be restored, etc.

By GEORGE O. IDE,
Attorney for Plaintiff in Error.

BRIEF.

I.

Proof of the death of Wm. B. Morris was an essential link in the plaintiffs' chain of title. The probate record offered was not competent evidence of such death. The Circuit court erred materially in admitting the record as evidence of such death, and in so charging the jury.

Mutual Benefit Life Ins. Co. v. *Tisdale*, 91 U. S., 241, 242, 244, 246.

Carroll v. *Carroll*, 60 N. Y., 123.

2 Wheaton's Evidence, Secs. 810, 1278.

The suggestion of the death, for the purpose of substituting new plaintiffs', did not relieve plaintiffs from the necessity of proving the death on the trial, as a part of the merits of the case. The death was an essential link in the title, and had to be proven by evidence, to entitle the plaintiffs to recover.

See *Milliken* v. *Martin*, 66 Ill., 17.

II.

The certified copy of a record of an alleged deed from Dunbar to Prout, in plaintiff's chain of title, was improperly admitted in evidence. The court erred in admitting this copy and in charging the jury that it was competent evidence.

1. It was not authorized by the state statute.

Rev. Stat. Illinois, 1877, Chap. 30, Sec. 36.

2. No foundation was laid for the use of such copy, by affidavit or oral testimony.

McCormick v. *Evans*, 33 Ill., 328.
Fabbri v. *Cunio*, 1 Bradwell (Ill.) 244.

3. The alleged deed was not acknowledged pursuant to any statute of Illinois.

1. If acknowledged before the grantor himself, the acknowledgment was void.

Hammers v. *Dole*, 61 Ill., 308, 310.
West v. *Krebaum*, 88 Ill., 263, 266.

2. Justices of the peace were not authorized to take acknowledgments without the territory of Illinois, on June 6, 1818. The deed was not entitled to record.

Act 1807, Sec. 13, 1 Adams & Durham's R. Est. St., 64.
Carpenter v. *Dexter*, 8 Wallace, 525.
Semple v. *Miles*, 2 Scammon, 317.
Choteau v. *Jones*, 11 Illinois, 320.
Buckmaster v. *Job*, 15 Illinois, 328.

3. Subsequent curative acts did not permit the use of this certified copy as evidence. The deed does not come within the provisions of such acts.

Act 1822, December 20, 1 Adams & Dur. R. Est. St., 71, does not include the District of Columbia, and besides the alleged acknowledgment, does not conform to the laws of the district. See point below.

Act of 1829, 1 Ad. & Dur., R. E. S., 83, requires

a certificate of the authority of the justice to accompany the deed.

Act February 26, 1841, requires a certificate of conformity from the clerk of a court of record.

1 Adams & Dur., R. E. S., 91, 92, 93.
Buckmaster v. *Job*, 15 Illinois, 330, 331.

Act of February 22, 1847, Sec. 1, required a certificate of the justice's authority to accompany the deed.

1 Adams & Dur., R. E. St., 174, 175.
Carpenter v. *Dexter*, 8 Wallace, 525, 518.

This certificate was essential to entitle a deed, acknowledged by a justice out of Illinois, to be recorded.

Vance v. *Schuyler*, 1 Gilman, 163.
Harding v. *Curtis*, 45 Illinois, 254.

The act of 1851, February 15, 1 Adams and Durham, R. E. St., p. 179, Sec. 5, provides only for deeds acknowledged in conformity with the laws of another *state*, does not include the *District of Columbia*, and requires also a certificate of conformity.

Buckmaster v. *Job*, 15 Ill., 331.

Act of 1872, Rev. St. Illinois, Hurd's Edition of 1877, Chap. 30, Sec. 20, requires a certificate of magistracy, and conformity with the laws of the district. Section 36 allows the use of a certified copy of the record of a deed only where the document appears to have been properly acknowledged so as to entitle the deed to record. Section 24 of this act requires, and every act since 1829 has required the certificate of acknowledgment to state that the grantor was "personally known" to the acknowledging officer.

From 1807 to 1829, justices of the peace without the state were not authorized to take acknowledgments. Since the latter year they have been so authorized, provided their certificate certifies that they personally knew the grantor, and is accompanied with a certificate of their official authority from a clerk of a court of record.

The acknowledgment to the deed from Dunbar to Prout was taken by unauthorized officers, and lacks the essential certificate of their official authority. The deed therefore was not executed and acknowledged according to the laws of Illinois.

The acknowledgment must be wholly according to the form prescribed by the statute of Illinois, or wholly in accordance with the laws of the District in force on January 6, 1818. The laws of both places cannot be blended to aid the defects.

Montag v. *Linn*, 19 Ill., 399, 401.
Adams v. *Bishop*, 19 Ill., 395, 397, 398.

4. The deed from Dunbar to Prout was not acknowledged in conformity with the laws of the District in force on January 6, 1818.

This deed was acknowledged in Washington county in the District.

The laws in force on January 6, 1818, in Washington county were the laws of Maryland, which existed on February 27, 1801.

Act of Congress, Feb. 27, 1801, Sec. 1, 2 Statutes 103.
Van Ness v. *Bank*, 13 Peters, 21.

The laws of Maryland required, when a deed was acknowledged before two justicies, out of the county where

the land lay, or out of the county where the grantor resided, that a certificate of the authority of the justices from the clerk of the County court should accompany the deed to complete the execution and acknowledgment and entitle the deed to record.

Act 1766, 3d Section, 1 Vol., p. 111 Dorsey's Laws of Maryland.

Milligan v. *Mayne*, 2 Cranch Ct. Ct., p. 210.

The deed in question shows that the grantor resided in Virginia, that the land did not lie in Washington county, and is not accompanied with any such certificate.

The curative act in Maryland, in 1807, 1 Vol. Dorsey, 549, does not apply to the deed in question. The act of congress of 1801 extended over Washington county those laws only of Maryland which existed on February 27, 1801. The act of 1807, moreover, contains a proviso, which excludes the inference that the act was intended to cure the lack of the certificate of magistracy.

5. The certified copy of the record of the deed to Prout was not a sworn, examined copy. There is no other evidence of its authenticity, than the clerk's certificate, appended to the copy. Such certificates are not evidence at common law, and are only authorized by the local statute.

1 Wharton's Ev., Secs. 94, 120.

The clerk's certificate was not authorized by the statute of Illinois (Sec. 36, Chap. 30, 1872, Hurd's Ed. 1877, p. 278), because the deed did not purport to have been executed and acknowledged in conformity with the laws either of Illinois or of the district.

III.

The execution of the deed by evidence under the common law rule was not shown by competent testimony. The copy of the destroyed depositions of Middleton and Collard was improperly admitted.

The depositions had not been restored under any statute on that subject, nor under any rule or order of the court.

No proof was offered showing that the witnesses were dead, nor any reason or excuse given why the witnesses could not be produced, or why their depositions had not been retaken. In the absence of such preliminary proof, it was incompetent to prove what the depositions contained.

Street v. *Cook*, 47 Illinois, 530, 532.
Aulge v. *Smith*, 34 Illinois, 537.
Street v. *Cook*, 57 Illinois, 386.
Hutchins v. *Corgan*, 59 Illinois, 70.

The same objections apply to the testimony concerning the contents of the destroyed deposition of H. H. Boone, as related in the deposition of A. Hyde; his deposition also is materially contradicted by the subsequent deposition of H. H. Boone herself.

IV.

The testimony of Corcoran and Hyde, as to the payment of taxes, was mere hearsay, and improperly admitted.

The duplicate tax receipts were not authenticated by

proof of the official authority and handwriting of the signers, and were also improperly admitted.

Tax receipts do not prove themselves, and like other receipts are subject to contradiction or explanation by parol.

Elston v. *Kennicott*, 52 Illinois, 272.

The extracts from certain tax collectors' books admitted, in several instances failed to show payment by Corcoran, nor was any evidence introduced, showing that the persons making the payments did so on behalf of Corcoran.

The copy of a deed to Lloyd, from certain persons, named Kelly and Putnam, was improperly admitted, there being no evidence whatever that they held under or were in any way connected with Joseph Duncan. The court also erred in charging the jury that these persons were heirs of Joseph Duncan.

V.

The evidence admitted as to the execution of the alleged deed from Dunbar to Prout, was not sufficient to entitle the proof of its contents to be admitted to the jury.

There was no evidence as to the identity of the alleged grantor, Dunbar, with the patentee. Proof of the handwriting of a subscribing witness should be accompanied with evidence as to the identity of the grantor.

Phillips on Ev., 4th Am. Ed., Cowen H. & E., pp. 490 to 505.

1 Greenleaf Ev., Sec. 575.

1 Wharton Ev., Sec. 701.

Evidence of identity gathered from mere similariy of name, is rebutted by the circumstances shown in evidence, and by the making of two deeds on the same date by Dunbar.

The question of identity was at any rate a question for the jury to decide. The court by its charge refused to allow the jury to pass upon this and other disputed questions and directed a verdict for the plaintiffs.

In Illinois the rule has been followed that when the subscribing witness cannot be produced, the deed may be proved by evidence as to the handwriting of both subscribing witness and the grantor.

Wiley v. *Bean*, 1 Gilman, 305.

The contents of the alleged deed were not proved by the next best grade of secondary evidence, viz: by an examined copy.

Mariner v. *Saunders*, 5 Gilman, 121, 122, 123.

VI.

The deed to Prout was not admissible as an ancient deed. It was not proven to have existed for thirty years. Its purported date did not raise the presumption of ancientness.

1 Wharton's Evidence, Sec, 194.

Jackson v. *Blanchard*, 3 Johnson R., 297, 298.

Smith v. *Rankin*, 20 Illinois, 14, 20.

Jackson v. *Luquere*, 5 Cowen, 221.

No accompanying possession for any period of time was shown.

Lessee of Clarke v. *Courtney*, 5 Peters, 344.
Fell v. *Young*, 63 Illinois, 109.
Jackson v. *Blanchard*, 3 Johnson R., 297.

The certificate of the recorder attached to the copy of the record of the deed was not evidence of the contents of the deed and of the endorsements upon it. The ancientness of the alleged deed could not be so proved.

Smith v. *Rankin*, 20 Illinois, 22.
1 Wharton's Ev., Sec. 115.
Younge v. *Guilbean*, 3 Wallace, 636, 640.

To admit a deed as ancient in Illinois, facts and circumstances must be proven, which shall establish the fact that the deed has been in existence the length of time indicated by its date, and the deed must be free from any just ground of suspicion.

Whitman v. *Henneberry*, 73 Illinois, 111, 112.

VII.

There was no evidence offered, outside of the certified copy of the alleged record, that the deed to Prout was recorded. Where and by whom recorded, would not have been shown even if the original deed had been produced with the endorsement: "Recorded June 23d, 1818."

The deed not having been properly acknowledged, the certified copy was incompetent to prove the alleged recording.

Smith v. *Rankin*, 20 Illinois, 19, 22.

The deed from Dunbar to Prout, through this lack of competent evidence as to recording, is not proven to have priority over the deed from Dunbar to Frank, both deeds having been made on the same day.

The law presumes that these deeds were made and delivered on the day of their dates. This presumption has not been rebutted by the evidence in the record.

Deininger v. *McConnell*, 41 Illinois, 232.
Harden v. *Osborne*, 60 Illinois, 97.
Jayne v. *Gregg*, 42 Illinois, 416.
McConnell v. *Brown*, Litt. Select cases, 459.

It was incumbent on the plaintiffs below, under such circumstances, to prove that the deed to Prout was the older deed. The burden of proof was on them to show their right to the possession of the land under a title superior to that derived under the Frank deed.

Of the two deeds the Frank deed alone was legitimately proven to have been recorded, and hence under the registry laws, is entitled to priority.

VIII.

Even if properly proven to have been recorded in Madison county in 1818, the deed to Prout was not constructive notice, its registry being void for the defects in its execution and acknowledgment.

The record of a deed not entitled to record is void, and cannot avail as notice.

St. John v. *Conger*, 40 Illinois, 535.
Smith v. *Rankin*, 20 Illinois, 23.

To entitle a deed to record, when acknowledged before a justice of the peace out of the county where the land lies, the indispensable certificate of magistracy must accompany the deed.

Harding v. *Curtis*, 45 Illinois, 254.
Vance v. *Schuyler*, 1 Gilman, 163.

The alleged recording of the Prout deed has not been cured by the conveyancing acts of Illinois. The deed does not come within the provisions of some of these acts, and as to others has not been perfected as to its acknowledgment in such manner as to be embraced by their provisions.

Act Dec. 30, 1822, 1 Adams & Dur. R. E. S., 71.
Act Jan. 27, 1829, 1 Adams & Dur. R. E. S., 83.
Act Jan. 18, 1833, 1 Adams & Dur. R. E. S., 85, 86.
Nottinger v. *Ware*, 41 Illinois, 251.
Act July 21, 1837, Adams & Dur. R. E. St., 91.
Deinger v. *McConnell*, 41 Illinois, 233.
Act Feb. 26, 1841, 1 Adams & Dur. R. E. St., 92, 93.
Act 1845, 1 Adams & Dur. R. E. St., 124, Sec. 16.
Act Feb. 22, 1847, 1 Adams & Dur. R. E. St., 174.
Act Feb. 15, 1851, 1 Adams & Dur. R. E. 179.

ARGUMENT.

I.

THE PLAINTIFFS BELOW, BY OMITTING TO PROVE THE DEATH OF WILLIAM B. MORRIS BY COMPETENT EVIDENCE, FAILED TO ESTABLISH TITLE IN THEMSELVES. THE PROBATE RECORD OFFERED WAS NOT SUFFICIENT EVIDENCE OF SUCH DEATH. THE CIRCUIT COURT ERRED IN ADMITTING IT AS EVIDENCE OF THE DEATH, AND IN CHARGING THE JURY THAT IT WAS OF ITSELF SUFFICIENT TO ESTABLISH THE DEATH OF MORRIS.

The questions raised under this head are embraced in the first and second assignments of error, and are fully presented by the objections to the rulings and the charge of the Circuit court on the trial, as shown in the bill of exceptions and in the preceding abstract or statement.

The bill of exceptions shows that the plaintiffs offered in evidence, for the purpose of showing that they derived their title to the land in controversy by devise from William B. Morris, a certified copy of a will of William B. Morris, and of its probate in the Probate court of Suffolk county, Massachusetts. It also shows that this document was not accompanied by any other evidence of the death of Morris than that furnished by this copy, and that there was not adduced, at any stage of the trial, any further proof that the alleged testator was dead. (Rec., p. 13, fol. 27; p. 16, fol. 35.)

It is obvious that the plaintiffs, claiming title only as devisees under the will of Morris, were not entitled to recover a verdict and judgment finding the fee simple estate in the land in them, without proof that the testator was dead. They were bound to recover, if at all, upon the strength of their own title. The alleged will would pass no title whatever to them until the testator actually deceased. Hence, proof of the death of Morris was a material and essential link in their chain of title. Without such proof, the prior documents admitted in evidence for plaintiffs showed only that the title, sought to be deraigned through Dunbar and Duncan, remained in Morris, and had not passed from him.

The probate record itself contains no finding or statement that Morris was proven to be dead, nor when he died. The findings relate solely to the proofs of the will and the issuing of letters testamentary. The testator is alluded to as deceased merely by way of description of the will and letters.

The Circuit court, overruling the objections of the defendant, admitted this record as sufficient evidence of the death, and also charged the jury that it was such evidence.

The question is thus distinctly presented in the record here. We urge that the court erred in its rulings and its charge in respect to this evidence; that it erred in admitting this probate record as evidence *per se* of the death of Morris, and in so instructing the jury, without requiring extraneous evidence of the death; that it erred, in the absence of other evidence of the alleged death than the probate record, in assuming and charging the jury that the death was sufficiently proven by the probate record; and that it erred, also, in not charging the jury, under this condition of the evidence, to find for the defendant.

We cite in support of this proposition that the probate record was not evidence of the death of Morris, the following authorities:

In this court, in *Mutual Benefit Life Ins. Co.* v. *Tisdale*, 91 U. S., 241, *et seq.*, the question was fully presented, discussed and decided.

On page 242 of the report it is said: "The chief "ground of argument to admit letters testamentary as "evidence of the death of the party is, that the order of "the Probate court issuing them is an order or judgment "*in rem.* But a judgment *in rem* is not *prima facie* evi- "dence; it is conclusive of the point adjudicated, unless "impeached for fraud." * * On page 243: "Again, "the Probate court has never adjudicated that Tisdale "was dead. Death was not the *res* presented to it. "Shall Mrs. Tisdale receive letters of administration was "the *res;* and upon that only has there been an adjudi- "cation. The letters issued to an executor or an admin- "istrator are, as a general rule, evidence only of their "own existence." * * On page 244: "The books "abound in cases which show that a judgment upon the "precise point in controversy cannot be given in evidence "in another suit against one not a party or privy to the "record." On page 246: "*Enough has been said to* "*demonstrate that neither upon principle nor authority was* "*it proper, in the individual suit of Mrs. Tisdale against a* "*stranger to admit letters of administration upon the estate* "*of her husband as evidence of his death.*"

In *Carroll* v. *Carroll*, 60 New York, Rep. 123, *et seq.*, it is held similarly, the court of appeals saying:

"Proof of the death of the testator was absolutely es- "sential to entitle the plaintiff, who claimed that she was

"his widow, to recover in this action. *The only evidence* "*of Carroll's death was the record of the probate of the* "*last will and testament, made before the Surrogate.* This "was received after an objection made, and the judge "charged the jury that it was *prima facie* evidence of the "death of Carroll, and being undisputed and uncontra- "dicted, was conclusive upon that question. The judge "was in error in both of these decisions named, and I "think that the exception to the evidence and the charge "were each well taken.

"Letters testamentary and of administration are con- "clusive evidence of the authority of the persons to whom "granted, and are sufficient to establish the representative "character of the plaintiff, who assumes to sue by virtue "thereof. * * It will be found, upon examination, that "the authorities cited upon this question relate mainly to "cases where the right of the administrator or executor to sue is involved, or where the parties were connected with the proceedings, interested in the estate, and had "their rights adjudicated upon when the will was estab- "lished before the Probate court. Such are the cases "cited from other states, with scarcely any exception, and "*none of them can be regarded as sustaining the broad* "*principle that the probate of a will of itself establishes* "*the death of the testator in any other case.* The general "rule laid down in 1 Greenleaf's Ev., Sec. 550, as to the "effect of a probate of a will, or the grant of letters of "administration, is also liable to criticism, and is not, I "think, sustained by the English cases which are cited to "support. (The same criticism on Sec. 550, 1 Green, Ev., "is made in the case in 99 U. S. R., 241.)

"It may then be considered as established by the cases "relied on by the plaintiffs' counsel, that letters testa-

"mentary and the proofs of a will before a surrogate, are "only evidence in some proceeding arising out of the will "itself, and the parties who claim under it or are con- "nected with it, and they cannot upon their face affect or "in any way control the interests of parties who are en- "tirely disconnected with the proceedings before the sur- "rogate and not within his jurisdiction. *It follows, there- "fore, that in an action of ejectment brought by the widow "to recover her dower, the probate of the will and the pro- "ceedings thereon, are not competent evidence to prove the "fact that the husband is dead, which is the very basis and "foundation of the action, and without proof of which it "cannot be maintained.* * * The English cases "sustain the doctrine that letters of administration are "not evidence of death and that it must be otherwise "proved. In *Thompson* v. *Donaldson*, 3 Esp., 63, Lord "KENYON held that letters of administration are not suf- "ficient proof of death, and remarked: 'The death was "a fact capable of proof otherwise.' (See also, *Moore* v. "*DeBernoles*, 1 Russ., 301.)

"It will also be noticed that this is a case where the "claim of title is made to real estate in an action of eject- "ment to recover the same, where more strict proof is "required than in cases where the question arises inci- "dentally and collaterally. (See 2 Gr. Ev., Sec. 27; 2 Ph. Ev., 93.)

" * * The evidence introduced was not suf- "ficient to establish his death, and it must be proved "otherwise."

2 WHARTON'S Ev., Sec. 810 says:

"We must, on similar reasoning, hold that when the "suit depends upon proof of the death of a particular

"person, as a substantive fact, letters of administration, "being *res inter alios acta*, are inadmissible to prove such "death. And it is now settled by the Supreme court of "the United States, that letters of administration are not "admissible as evidence in proof of death, in a suit brought "by a plaintiff in his individual character, and not as ad- "ministrator, to recover a claim on a policy of life insur- "ance, the right of action depending on the death "of the third person, whose life this policy insured. "Nor is there any reason why such letters should be evi- "dence to prove death in an action brought on the policy "by the administrator."

See also, Sec. 1278, same author.

In the case at bar, the defendants in error were not suing in any representative capacity as executors or administrators. They were suing as individuals claiming title to the land. The plaintiff in error was not a party or privy to the probate proceedings in Massachustts. He was a stranger to the alleged will, and claimed title in his own right, in nowise connected with or derived under the will. He was in a position, therefore, to require proof from the plaintiffs of the death of the person under whom they claimed title by devise. That death, if a fact, was capable of being proved and should have been proved otherwise than by the probate proceedings.

The suggestion of death and substituting other plaintiffs, on the part of the plaintiff's counsel, during the pendency of the suit, and before the trial, does not affect the question. Such suggestion is allowed by the statutes of Illinois to prevent the suit from abating. But the order entered on such suggestion is not an adjudication on the merits of the cause, does not establish any right to sue in the sub-

stituted parties, and does not obviate the necessity of proof of the decease. Proof of the death was part of the plaintiffs' claim of title, and was a necessary part of the evidence. In such case the Supreme court of Illinois has said:

"When Brandon died the heirs had themselves substi-
"tuted parties plaintiff, and prosecuted in their own right,
"and thus became the real plaintiffs in the suit, and to
"recover they had to show that the person under whom
"they claimed was seized of the title, and that they were
"his heirs."

Milliken v. *Marlin*, 66 Illinois R., p. 17.

II.

THE COURT ERRED IN ADMITTING IN EVIDENCE THE CERTIFIED COPY OF THE ALLEGED DEED FROM DUNBAR TO PROUT, WITH THE MEMORANDA AND CERTIFICATES THERETO ATTACHED, AND IN CHARGING THE JURY ON SUCH EVIDENCE TO FIND FOR THE PLAINTIFFS.

Plaintiffs below offered in evidence, as an essential link in their chain of title, a certified copy of an alleged deed from Dunbar, the patentee, to William Prout, and of a certificate of acknowledgment and other written matter, following the same, and forming no part of the conveyance. The copy introduced purported that the deed was dated January 6, 1818, and the only indication of its ever having been recorded appears in a statement, not authenticated by any officer or other person, at the foot of and following the written matter referred to, in these words: "RECORDED JUNE 23D, 1818." The certificate of ac-

knowledgment has for its venue, "District of Columbia, "county of ———," and is signed by the grantor in the deed, himself, thus: "John his X mark I. Dunbar. Below this certificate of acknowledgment appears the following: "Acknowledged before— Samuel N. Smallwood, Joseph "Cassin." Blanks or unfilled places for names appear not only in the venue and body of this certificate, but also in the body of the deed. The certificate on its face reads as though the grantor certified to his own acknowledgment. If it be argued that the statement below the certificate signed by Smallwood and Cassin, is to be read with the certificate, and that they are the justices of the peace referred to in the certificate, it cannot be gathered from the certificate to which of the two counties, Washington and Alexandria, into which the district in 1818 was divided, these justices belonged. It, however, appears from the deed at its close that Dunbar signed it at Washington city in Washington county, and from the commissions issued by President Monroe that a Joseph Cassin and a Samuel N. Smallwood were appointed justices of the peace of Washington county in the year 1817. No certificate of magistracy, however, accompanies or is attached to this deed and certificate. The statement, "acknowledged before Joseph Cassin and James N. "Smallwood," is separate and detached from the certificate of acknowledgment, and without any official designation after the names, such as "J. P.," or the like. The certificate under any construction is defective in not stating to what county the justices belonged, and in not certifying that the justices had affixed their names to and signed the certificate. It reads that the said — *has* thereto affixed *his* name, and has undersigned the same, and then follows the name of John I. Dunbar, thus clearly indicating

that he is the person thus referred to in the singular number. The detached statement below, "acknowledged before," fails to state by whom, where and when the alleged deed was acknowledged, lacks the essential features of an acknowledgment, and does not so connect with the acknowledgment as to clearly show that Smallwood and Cassin certified to the truth of the statements in the certificate, appearing above Dunbar's name. Attached to this copy is a certificate made by the circuit clerk of Madison county, Illinois, showing that he made this copy from the records of deeds in his county, on February 3, 1875.

The Circuit court charged the jury that "the original "deed from Dunbar to Prout was not so acknowledged "as to entitle it to record," and "if it had been properly "acknowledged, then on the loss of the original the plaintiff could have obtained a certified copy, and introduced "it in evidence," but assumed that it *was recorded* in Madison county on the strength of this clerk's certificate, made in 1875. We say on the strength of this certificate alone, because there is not in the record, outside of this certificate and the copy to which it is appended, a particle of evidence showing, or tending to show, that such a deed was ever recorded at all. The matter certified was not from the records of a court, but from entries of deeds in the office of a clerk acting in his ministerial capacity as a recorder *ex officio*. The certificate is not made under or in conformity with any statute of the United States concerning proofs of records and books kept in offices or in courts. It could only be used under the statutes of Illinois, and those statutes do not permit such use of certified copies of deeds, unless the deeds of record are executed and acknowledged in due form accord-

ing to the laws of the state. This certificate of the recorder, therefore, did not, under any statute or common law rule, make the copy admitted legitimate evidence of the contents of the alleged deed from Dunbar to Prout, and of the writings claimed to accompany it.

The objections made to this document are specifically recited in our abstract, and are fully preserved in the bill of exceptions.

The state statute, concerning the use of copies of recorded deeds, reads:

"Whenever, upon the trial of any cause in law or "equity in this state, any party to said cause, or his agent "or attorney in his behalf, shall orally in court, or by af- "fidavit to be filed in said cause, testify and state under "oath that the original of any deed, conveyance or other "writing of or concerning lands, tenements and heredita- "ments *which shall have been or may hereafter be acknowl- "edged or proved according to any of the laws of this state*, "and which, by virtue of any of the laws of this state, "shall be required or be entitled to be recorded, is lost or "not in the power of the party wishing to use it on the "trial of any such cause, and that to the best of his "knowledge, said original deed was not intentionally de- "stroyed, or in any manner disposed of for the purpose "of introducing a copy thereof in place of the original, "the record of such deed, conveyance or other writing, "or a transcript of the record thereof, certified by the re- "corder in whose office the same may have been or may "hereafter be recorded, may be read in evidence in any "court in this state, with like effect as though the "original of such deed, conveyance or other writing was "produced and read in evidence."

Rev. Stat. Ill., 1877, Chap. 30, Sec. 36.

Two things are essential and must appear, before a copy of a recorded deed can be read in evidence under this statute:

First, that the deed *was acknowledged according to the laws of the state, and was entitled to be recorded*; and,

Second, that a foundation is laid by oral evidence or affidavit that the original is lost or not in the power of the party to produce, *and has not been intentionally disposed of for the purpose of introducing* a copy in place of the original; and these must be sworn to, and are not to be inferred by the court when objection to the foundation is made.

McCormick v. *Evans*, 33 Ill. R., 328.
Fabbri v. *Cunio*, 1 Bradwell (Ill.), 244.

It was objected on the trial, among other things, that no foundation had been laid for the use of the copy of the Dunbar deed. (Rec., 23, fol. 52.)

The only evidence, offered under the statute above quoted, was that of Mr. Dent, who testified "that said "original deed had been burned up in the Chicago fire of "October 8 and 9, 1871." (Rec., 23, fol. 52.) But how or under what circumstances this deed was burned, whether accidentally or purposely, does not appear from this preliminary evidence.

The requisite of the statute requiring the deponent to state under oath that the deed was not intentionally destroyed for the purpose of introducing a copy, is entirely lacking. The foundation required by the statute was not laid, nor was it waived, the objection to the foundation having been renewed after this preliminary evidence was given. (Rec., 28, fol. 65.)

It was also objected, in apt time, to this copy going in evidence, that the deed from Dunbar had not been properly executed and acknowledged, according to the laws of Illinois, and that no certificate as to the magistracy of the alleged grantees was attached to said purported deed. (Rec., 23, fol. 52.)

THE DEFECTS IN THE ACKNOWLEDGMENT ARE MATERIAL AND FATAL TO IT.

Without a sufficient acknowledgment, the original deed could not have been read in evidence without common law proof of its execution; with still less reason could the record of such deed, or a certified copy of such record, be received in evidence.

DEFECTS IN THE ACKNOWLEDGMENT.

1. If the acknowledgment was made before the grantor himself, as the grantor's signature to the certificate would imply, the certificate is void and there is no evidence of a legal acknowledgment. It does not appear that the grantor had legal authority to take such an acknowledgment. A grantor also cannot acknowledge his deed before himself, even if authorized by law to take acknowledgments.

Hammer v. *Dole*, 61 Ill., 308, 310.
West v. *Krebaum*, 88 Ill., 263, 266.

2. Treating the deed as acknowledged before two justices and not before Dunbar, the certificate is bad, because it is uncertain in not showing that the parties signed the certificate above the signature of Dunbar, and so certified to the facts mentioned in that certificate. The state-

ment "acknowledged before Samuel N. Smallweed, "Joseph Cassin," is disconnected from the certificate and contains no language showing that the certificate of acknowledgment was made or signed by them.

3. Again, justices of the peace were not authorized by the laws of Illinois in force on January 6, 1818, to take the acknowledgments of deeds made without the territory.

The act then in force was the one of September 17, 1807. The act of 1819 was not enacted until February 19, 1819.

The 13th section of the act of 1807, provided "that "deeds made by persons not residing within this territory, "the acknowledgment being taken before any *mayor or* "*chief magistrate* or *officer of the cities, towns or places* "where such deeds are made, *and certified under the com-* "*mon or public seal of such cities, towns or places*, shall be "as valid as if the same had been acknowledged before "a judge or a justice of the county where the land was "situated."

Purple's Real Est. Statutes, 462.

The act of 1819, in this respect, is the same.

Sec. 8, Adams & Durham's Real Est. Stat., Vol. 1, page 67.

In *Carpenter* v. *Dexter*, 8 Wallace, 525, it is held that in 1818, justices of the peace were not authorized by the laws of Illinois to take the acknowledgment or proof of deeds without the state.

Sample v. *Miles*, 2 Scammon, 317, and *Choteau* v. *Jones*, 11 Illinois, 320, also hold that under the act of 1819, the provisions of which, as to officers, are the same as

those of the act of 1807, justices of the peace without the state could not take such acknowledgments, and that even within the state, the certificate of the justice, unless he resided in the county where the land lay, must be accompanied by a certificate from a court of record of the justice's official character.

In *Buckmaster* v. *Job*, 15 Illinois, 328, it was held, without passing on the question of the officer, that the acknowledgment of a deed executed out of the territory, under the act of 1807, should have the certificate of the officer taking it authenticated by the proper public seal of the executive authority where he resides, and for want of such proof the deed was excluded.

In the case at bar, the Dunbar deed purports to have been made in Washington, D. C., and if acknowledged at all before them, was acknowledged before two justices of the peace of the district; is not accompanied by any certificate whatever of their official character, and is unauthenticated by any public seal, as required by the act of 1807.

It follows that the deed from Dunbar to Prout was not acknowledged nor entitled to record under the act of 1807, and if recorded in fact, that a certified copy of its record was not competent evidence under the section of the state statute above quoted, unless the defects mentioned were cured by subsequent legislation.

4. Subsequent curative acts as to deeds did not permit the use of this certified copy of the Dunbar deed, for the reason that the provisions of those acts are not shown to have been complied with.

Curative acts, relating to the evidence of deeds, were

enacted by the Illinois legislature in 1822, 1829, 1837, 1841, 1845, 1847. The act of 1872, now in force, repealed all prior laws on the subject.

We cannot undertake to recite the provisions of these laws in full without making a volume, and must, therefore, beg leave to call attention to them by reference to the pages of the compilation in which they are contained.

(*a.*) The act of December 20, 1822, *Adams & Durham* R. E. St., 1 Vol., page 71, 2d section, validated deeds previously recorded, which had been executed and acknowledged in conformity with the laws of the state or territory in which they were executed. The act does not embrace the District of Columbia. It embraces only the states and territories. Besides, the Dunbar deed was not acknowledged according to the laws of the district, as shown in the point on that head, *supra.*

Besides, as said in *Buckmaster* v. *Job*, 15 Ill., 330, "there is nothing in the case to show that the deed was "executed in conformity to the laws of the district. This "court cannot presume that the laws of that (district) "authorized justices of the peace to take the acknowl- "edgment of deeds. That is a matter of statutory regu- "lation or local usage, of which the courts of another "state cannot take judicial notice. It must be proved as a "fact by the production of the statute, or by evidence "of the usage. But if justices of the peace have "such authority, there would still be no proof of the offi- "cial character of the person before whom the deed was "acknowledged."

The federal courts do not take judicial notice of the justices of the peace of another state.

In re Keeler, Hempstead U. S. Ct. Ct., 307–312.

A court will take judicial notice of the civil officers in the county in which it holds its sittings; *Thielman* v. *Burg*, 73 Illinois, 293; *Graham* v. *Anderson*, 42 Ills., 517; and the like notice of the heads of departments, principal officers of the state and judges of courts of general jurisdiction (1 Gr. Ev., Sec., 6), but the existence of subordinate officers, though in the same state, must be proved.

1 Wharton's Ev., Sec. 337.

(*b.*) The act of 1829, 1 Adams and Dunham R. E. S., Vol. I, 83, does not help, because that act requires that there shall be added to the deed, when acknowledged before a justice residing out of the state, a certificate of his official capacity from the proper clerk.

(*c.*) Nor does the act of July 21, 1837, nor the act of February 26, 1841, aid at all. The first act requires the execution of the deed to be proved according to the rules of evidence. The latter validates a deed, acknowledged in conformity with the laws of the state, territory or district in which it was executed, only when the clerk of a court of record in such locality shall certify under the seal of the court that the deed was so acknowledged. No certificate from a clerk of a court of record in the District of Columbia was attached to the Dunbar deed, nor proof made that any was ever attached to it. The original deed itself was not produced. Its contents were sought to be established by the copy in question.

Buckmaster v. *Job*, 15 Illinois, 330, 331.

1 Adams & Durham's, R. E. S., 91, 92, 93.

(*d.*) The act of February 22, 1847, section 1, Adams & Durham's R. E. S., Vol. I, 174–5, also required that when the justice taking the acknowledgment resided out of the state, there should be added to the deed a certificate

from the proper clerk, setting forth that the justice was such at the time of taking the acknowledgment; and it is so held in *Carpenter* v. *Dexter*, 8 Wallace, 525, 518. To entitle a deed to be recorded under an act with such a provision, such certificate of magistracy must accompany the deed.

Vance v. *Schuyler*, 1 Gilman (Ills.), 163.
Harding v. *Curtis*, 45 Illinois, 254.

The third section of this act of 1847 covers only the use in evidence of *original* deeds, and does not relate to the use of certified copies of their records. It was the original deed that was offered in evidence in the cases of *Secrist* v. *Green*, 3 Wallace 750, and in *Hunt* v. *McCartney*, 18 Illinois, 131. What is said in those cases relates to the use of the original deeds, and should be so understood. Besides, the deeds in those cases were not acknowledged before a justice of the peace. The first section of the act expressly requires the certificate of magistracy in the case of a justice. This is the view taken in *Carpenter* v. *Dexter*, 8 Wallace, 525. In that case a certificate of the justice's authority accompanied the deed. (See page 516.)

(*e.*) Nor is the defect cured by the act of February 15, 1851. (1 Adams and Durhams, R. E. S., 179.) That act, section 5, provided that a certified copy of a deed, made and acknowledged without the State of Illinois, in conformity with the laws of the *state* (district or territory is not embraced) where such deed was acknowledged, and which has been recorded in the proper county, may be read in evidence, *provided* the certified copy is accompanied with a certificate of conformity. No such certifi-

cate was shown in evidence in support of the copy in question.

See *Buckmaster* v. *Job*, 15 Illinois, 331.

(*f*.) The law in force at the time of the trial of this cause, concerning evidence of title, is the act of 1872, found in Hurd's Rev. Stat. Ills. (1877), Chap. 30, pp. 275, 277, 278.

Sections 20, 31, 35 and 36 of this act concern the acknowledgments of deeds, the proof of deeds, and when certified copies can be introduced in evidence.

Section 20 provides that when the deed is acknowledged in the District of Columbia, before a justice of the peace, "*there shall be added a certificate of the proper clerk,* "*under the seal of his office, setting forth that the person before* "*whom such proof or acknowledgment was made was a justice* "*of the peace at the time of making the same.* An acknowl- "edgment or proof may be made in conformity with the "laws of the state, territory or district where it is made; "*Provided*, that if any clerk of a court of record, within "such state, territory or district, shall, under his hand and "the seal of such court, certify that such deed or instru- "ment is executed and acknowledged or proved in con- "formity with the laws of such state, territory or district, "or it shall so appear by the laws of such state, territory "or district, duly proved and certified copies of the record "of such deed, mortgage or other instrument relating to "real estate, heretofore or hereafter made and recorded "in the proper county, may be read in evidence, as in "other cases of such certified copies, upon such a cer- "tificate of conformity to the laws of the state, territory "or district where such deeds, mortgages or other in-

"struments were made and acknowledged, being exhibited "therewith or annexed thereto."

In the case at bar, the prerequisites of this section do not appear. In the copy of the Dunbar deed, there is no such official certificate as to the authority of Smallwood and Cassin, and hence there is no proof that the deed was acknowledged according to the laws of Illinois; there is no certificate of conformity, nor is there in the record any proof that the acknowledgment was taken in conformity with the laws of the District of Columbia, and hence no foundation was laid for the use of the copy of the deed, under this section. The section does not authorize the use of such a copy in the absence of this proof.

In *Hunt* v. *McCartney*, 18 Illinois, 131, the Supreme court of Illinois, interpreting the record or statute of 1847, say: "Theordinary way of proving conformity with the "law of the place of execution, is by the production of the "statutes of the state or territory, authorizing the mode of "execution and acknowledgment adopted."

Section 31 provides that deeds may be recorded though not acknowledged or proven according to law, "but the "same shall not be read as evidence, unless their execu- "tion be proved in manner required by the rules of evi- "dence applicable to such writings, so as to supply the "defects of such acknowledgment or proof."

Section 35 provides that a deed, *when acknowledged or proved according to the provisions of the act*, and under it entitled to record whether recorded or not, may be read in evidence without further proof of its execution; and that when the original is lost or cannot be produced, a certified transcript from the record of such deed, *when so acknowledged or proved*, may be read in evidence. This

section is prospective, and does not, like the next section, cover prior recorded deeds.

Section 36 is the section quoted *ante*, and under which the copy of the Dunbar deed was sought to be introduced. This section also requires that the original deed shall *have been acknowledged* according to the laws of the state before a copy of its record can be introduced.

Section 24 of this act requires, and every act of Illinois concerning conveyances since 1829, beginning with that year, also has required the certificate of acknowledgment to state that the grantor was *personally known* to the officer taking the acknowledgment.

The Dunbar deed is shown by the laws above recited not to have been acknowledged in conformity with the statutes of Illinois, from the beginning to the present time, in these respects, namely: in that the certificate of acknowledgment is not accompanied with any certificate of the magistracy of the justices of the peace purporting to have taken the acknowledgment; also, in that from 1807 to 1829 justices of the peace residing out of the state had no authority under the state statutes to take acknowledgments, and in that from 1829 to the present time all acknowledgments, whether taken in or out of the state, if taken in conformity with the state statutes, must show that the grantors were *personally known* to the officer, which statement is wanting in the certificate to the Dunbar deed.

In order to sustain this acknowledgment it must appear that it was acknowledged wholly under the Illinois statute, or wholly under the laws of the District of Columbia. It must be under one form or the other. The laws of both places cannot be blended with each other.

There must be conformity with the one law or the other, in the officer as well as the form used.

Montag v. *Linn*, 19 Illinois, 399–401.
Adams v. *Bishop*, 19 Illinois, 395, 397, 398.
Job v. *Tibbetts*, 4 Gilman, 148.
Tully v. *Davis*, 30 Illinois, 103.

The Dunbar deed was not executed and acknowledged in conformity to any statute of the State of Illinois. Was it executed and acknowledged in conformity with the laws of the District of Columbia in force in 1818?

5. THE DEED FROM DUNBAR TO PROUT WAS NOT EXECUTED AND ACKNOWLEDGED IN CONFORMITY WITH THE LAWS OF THE DISTRICT IN FORCE ON JANUARY 6, 1818.

First, because the certificate is uncertain in itself and as to the person or persons who certify. It does not certainly show that Smallwood and Cassin made any other certificate than the statement "acknowledged before," which appears just above their names, and which fails to state what was acknowledged before them, and by whom, and when, and where, and in what capacity they took the acknowledgment, and so lacks all the essential elements of an acknowledgment to a deed.

Second, because there is no certificate of the official character of the alleged justices of the peace accompanying the certificate of acknowledgment. In this the law of the district was the same as that of Illinois.

The deed shows that the grantor executed it on Jan. 6, 1818, at Washington City, in Washington county, in the District of Columbia. The deed also shows that Dunbar was a resident of Mahew county, Virginia. The certificate of acknowledgment, which is signed by Dunbar, and

has for its venue, "District of Columbia, County of ———, ss.," and is followed below by the second certificate, "Acknowledged before Samuel N. Smallwood, Joseph Cassin," fails to state in what county of the district the alleged acknowledgment, whether taken before Dunbar himself or by Smallwood and Cassin, was actually taken. If the certificate appearing above Dunbar's name is construed to be also that of Smallwood and Cassin, then, by construing the certificate with the deed, as was done in *Carpenter* v. *Dexter*, 8 Wallace, 528, 529, it sufficiently appears that the acknowledging was done in Washington county. It appears also that Smallwood and Cassin were commissioned as justices of the peace in Washington county in 1817.

The deed, then, if acknowledged anywhere, was acknowledged in Washington county.

On January 6, 1818, the laws in force in Washington county were those in force on February 27, 1801, in the State of Maryland, by which state the territory embraced in Washington county was ceded to the United States. By the "act concerning the District of Columbia" of February 27, 1801, Congress enacted "that the laws of the "State of Maryland, *as they now exist* (*i. e.* at the date of "the passage of the act) shall be and continue in force in "that part of the district which was ceded by that State "to the United States."

Sec. 1, Act Feb. 27, 1801; 2 Stat., 103.
See also, *Van Ness* v. *Bank*, 13 Peters, 21.

The only law of Maryland, concerning the acknowledgment of deeds and applicable here, in force in the District on January 6, 1818, is the 3d section of the act of 1766. The second section applies to acknowledging be-

fore justices in the county where *the land lies.* The third section applies where the grantor does not live in the county where the land lies. It will be borne in mind, that the supposed deed shows that Dunbar lived in Virginia, and that the land lay not in Maryland but in Illinois.

The third section reads:

"When the person or persons making any deed or con-
"veyance for conveying, or declaring, or limiting any sale,
"on or for any lands, tenements or hereditaments, shall
"*live* remote from the provincial court, or *out of the*
"*county where the lands*, tenements, or hereditaments lie,
"it shall and may be lawful for such person or persons
"to acknowledge the same in the county court of the said
"county, or *before two justices of the said county wherein*
"*he or they shall reside;* and a certificate of such acknowl-
"edgment, under the hand of the county clerk, and un-
"der the seal of the same county being endorsed thereon,
"that the said acknowledgment was made in open court,
"if made in court, or *if before two justices that they were,*
"*at the time of making the said ackowledgment justices of*
"*the said court, duly commissioned* and sworn, such deed
"or conveyance shall be taken, deemed and reputed, and
"shall be as good and valid as if the same had been
"acknowledged in manner first herein mentioned; *and*
"*such certificate shall be a sufficient warrant for the clerk*
"*of such county where the lands do lie to record such deed*
"*or conveyance*, and the endorsements thereon."

I Vol., Dorsey's Laws of Maryland, p. 111.

By virtue of section 11 of the act of congress of 1801, and section 5, chapter 24 of another act of 1801, concerning the District, justices in the District were given the powers of such justices in Maryland, and the clerk of

the Circuit court of the District was empowered to certify as the clerk could do in Maryland under the above statute.

In *Milligan* v. *Mayne*, 2 Cranch, Ct. Ct., p. 210, it was held: "when a deed of land in Maryland is acknowledged "by the grantor before two justices of the peace in the "county where the grantor resides (not being the county in "which the land lies) such deed is not properly recorded, "*unless there were indorsed on the deed a certificate of the "clerk of the county under the seal of the court that the "two justices were at the time justices of the peace of that "county, and such certificate is recorded with the deed.*"

The following Maryland cases also show, that it was the practice and understanding in that state to attach the clerk's certificate of magistracy to an acknowledgment to a deed, when taken by two justices in cases where the land was not situated in the county of the justices, and the grantor lived out of the county where the land lay.

Gittings v. *Hall*, 1 Harris & Johnson, 14, 18, 27, 28.

Linn & Lees' lessee v. *Deakins*, 2 Harris & McHenry, 48.

Beall v. *Lynn*, 6 Harris & Johnson, 336, 355, 365.

In *Van Ness* v. *The Bank*, 13 Peters, 19, the land lay in Washington county, and the acknowledgment was taken before two justices of that county, and for aught that appears the grantor resided there.

The grantor, as it is stated in the Dunbar deed, belonged in Mahew county, Virginia, and there is no proof in the record that he resided elsewhere. In *Gitting* v. *Hall*, 1 Harris & Johnson, 27, 28, the court held that a similar statement in a deed was evidence of the grantor's

residence, and that a conveyance of land, acknowledged before two justices of the peace in a county in which the grantor did not reside, and where the land was not situated, was inoperative.

A careful examination of the law in force in the district when the purported acknowledgment to the Dunbar deed was taken, will show that such law was not complied with. We insist, therefore, that the deed in question was not executed and acknowledged in conformity with the law of Illinois or of the district, in force on January 6, 1818, and consequently that the certified copy objected to, was improperly read in evidence.

The original deed not being acknowledged before two justices of a county in which the land was situated and in a county wherein the grantor did not reside, and lacking the requisite in such case of a certificate of the official character of the officers from a clerk of a court under the seal thereof, was not entitled to record under the Maryland law of 1766, and if it had been produced on the trial, could not, for this lack of conformity with that law, have been read in evidence in the courts of Maryland, without common law proof of its execution.

With still less reason could a certified copy of the record of such deed be used in evidence. As is said in *Connelly* v. *Brown*, 6 Harris and Johnson, 143, such copy *per se* cannot be read in evidence, unless the original was entitled to be recorded.

The statutes of Illinois and the District of Columbia both required evidence of the official character of the justices, in the shape of a certificate from the clerk of a court, to accompany their supposed acknowledgment of

the Dunbar deed. This rule is recognized and admitted in *Carpenter* v. *Dexter*, 8 Wallace, page 531.

If it be suggested that a curative act enacted in Maryland in 1807 (Dorsey, Vol. I., p. 549), cures the want of this certificate, the reply is:

First: That the act of congress concerning the District, did not extend this act of 1807 over the District. The act of congress of 1801 defined what laws of Maryland were extended over Washington county. The act expressly states that the laws so extended are those of Maryland, "*as they now exist*," namely, those in force on February 27, 1801.

Second: Even if it were true that the act of 1807 applied to the district, nevertheless the provisions of that act do not cure the lack of the certificate of magistracy. Section two of that act enumerates what acts it was intended to cure, and in this enumeration the lack of the certificate of magistracy to an acknowledgment is not mentioned. The proviso at the end of the section excludes the idea that it was intended to waive the absence of such certificate, for in that proviso it is expressly "provided, *that in every other respect* "(than those enumerated above the proviso) the aforesaid "deeds have been executed, acknowledged and recorded, "agreeably to the laws heretofore made on the subject." For a knowledge of these other respects the proviso thus refers directly back to the third section of the act of 1766, which requires the certificate of magistracy to complete the acknowledgment of a deed like the one in question and to entitle it to record.

Nor does the third section of the act of 1807 aid the matter. By that, two justices of the peace within their own county were given the power to take acknowledg-

ments the same as the judges of the County court. By reference to section three, act 1766, it appears that a deed could be acknowledged in the County court, but in such case the certificate of such acknowledgment was required to be endorsed on the deed by the clerk, under the seal of the court. This section makes no change in the law requiring a certificate of magistracy from the clerk, when the acknowledgment is taken before two justices of the peace in cases where the land does not lie in their county.

The certified copy in question was not an examined copy of an original deed, nor was it offered as such. The only evidence concerning this was that of Mr. Dent. (Rec., 23; fol. 52.) He says the original deed was burned up in 1871; that he had not made the copy; that he had not compared the offered copy with the original. How could he, when the alleged original was burned in 1871, and the copy was not made until 1875? He believed, he states, from recollection, that the copy corresponded with the original. He does not state that he compared the offered copy with any alleged record in Madison county.

This evidence shows that it was not an examined copy of either the original deed or its record, made by Mr. Dent. The rule is that to enable such a paper to be read as an examined copy, the witness must swear that he has compared the copy tendered with the original. (Wharton's Ev., Sec. 94.) The person making the copy was not produced as a witness, only his certificate, and that does not profess to be a copy of an original deed. The certificate of this clerk of Madison county was not competent evidence under common law rules to prove the contents of the record of the alleged deed. Such a certificate is evidence

only when provision is made by statute for such secondary evidence. (1 Wharton's Ev., Sec. 120.) The statute of Illinois provides that such a certified copy can only be used in evidence, when the deed has been executed and acknowledged and recorded in conformity with the laws of the state. (Sec. 36, Conveyance 1872, above quoted.)

This deed from Dunbar to Prout was not executed and acknowledged in conformity with the laws of Illinois, nor with those of the District of Columbia, for the reasons heretofore given. In no point of view was this copy evidence *per se* of the contents of the supposed deed and its record. Its admission as such, in evidence, was material error on the trial of this case.

III.

THE EXECUTION OF THE DEED FROM DUNBAR TO PROUT WAS NOT PROVEN BY COMPETENT EVIDENCE. THE COPIES OF DEPOSITIONS WERE IMPROPERLY ADMITTED FOR THAT PURPOSE. THE PROOFS AS TO PAYMENTS OF TAXES WERE INSUFFICIENT. QUESTIONS OF FACT FOR THE JURY WERE TAKEN FROM THE JURY BY THE DIRECTION TO FIND FOR THE PLAINTIFF.

The plaintiffs below, having failed to establish that the Dunbar deed was properly acknowledged, as is admitted in the charge of the court, and so being unable to introduce the certified copy in evidence, under the statute providing for the use of such copies, sought to prove the execution of the original deed from Dunbar to Prout by the evidence of witnesses, as at common law.

That there was an original deed is shown by the evidence of Mr. Dent and Mr. Hyde. What the contents

of the deed were, outside of the copy, can only be gathered from Mr. Dent's evidence. What those contents were is not definitely stated by him. Speaking on July 18, 1879, the date of the trial, and after a lapse of nearly eight years after the burning of the deed in October, 1871, he says that he did not make the copy made in 1875, nor compare it with the original deed, but he believed from recollection that it corresponded with the original. His evidence is confined to the contents of the deed itself, does not purport to give those contents except by reference to the copy, and does not even state what certificates, memoranda or endorsements, if any, were upon the original deed, nor, in fact, that there were any upon it. His evidence is silent as to the certificates, and statement of recording. That there were any such certificates attached, or any other memorandum or endorsement upon the deed, and what the contents of the same were, beyond a bare allusion to them in the testimony of Middleton and Collard, appears only from the copy offered, which copy was not competent evidence to prove the existence of such matters. It is self-evident that the item, unattested, in the copy, to wit: "Recorded June 23d, 1818," is an entry made by someone in a book for recording deeds, and was not borne upon the deed before it was filed for record. The certified copy, therefore, must be held to be a transcript of the record of the deed, and of a statement or memorandum of the date of recording, made by some third person, whose name is not given. Whether or not that memorandum was endorsed upon the deed itself after being recorded, could appear only from inspection of the deed itself, or from oral proof. And on this point the evidence is silent; so that we say, from the evidence in the record, there is no proof outside of this copy as to

anything other than the contents of the original deed or conveyance, and which does not include certificates attached to or endorsements made upon it.

The execution of the deed was sought to be proved by the evidence of Middleton and Collard, testifying to the signature of Smallwood as a subscribing witness to the deed. These witnesses were not produced in court, nor their original depositions taken in this case. Their depositions had been burned in the fire of 1871. What their depositions contained was allowed by the court to be shown by an unauthenticated copy made by an attorney.

This copy had been placed on file by the plaintiff's attorney, with the consent of the then attorney of the defendant, but without any stipulation or agreement, that such copy could be read in evidence, or could be used for that purpose without further proof. It was not filed under any order or direction of the court, nor had any authority been given by the court to treat this copy as a part of the restored files in the case. The order for restoring files embraces only the declaration and plea. (Rec., 2; fol. 3.) No proof or explanation was offered why the depositions of Middleton and Collard had not been re-taken, nor any proof that their depositions could not be easily re-taken. (Rec., 24; fol. 53, 54.) The court admitted this copy and allowed it to be read in evidence as proof of Smallwood's signature. Our specific objections to this secondary evidence appear in the record. (Page 24.)

This copy of a deposition was not competent evidence:

1. For the reason that sections 899, 900, 901, 902, 903, United States statutes, provide the mode of restoring lost or destroyed records in the northern district of Illinois. No attempt was made to restore the depositions

under these sections and to substitute the copy in question as therein directed.

2. For the reason, that no proof was offered, showing or tending to show, that the witnesses were dead, or incompetent to testify, or were not within the jurisdiction of the court and could not be produced; for the reason, also, that the testimony offered was not that of witnesses who testified on a former trial, and that no reason or excuse was offered why these witnesses were not produced in court or their depositions retaken, and also because no witness testified that the copy was a true copy of the destroyed depositions, said copy offered being wholly unanthenticated by any official certificate.

The rule is well settled in the Supreme court of Illinois, and we believe in the courts of other states, that in the absence of evidence, that the witnesses who testified on a former trial are dead, insane or kept away by the adverse party, it is not competent to show what such witnesses testified on the former examination. Thus, in *Stout* v. *Cook*, 47 Illinois, 530, 532, in which it was sought to prove the contents of missing depositions, it is said:

"In cases where the witnesses are still living, and their "testimony might be retaken, secondary evidence will "not be permitted to show what such witness testified on "the previous examination. When the witness has died, "or become insane, after his evidence has been taken, or "is kept from attendance by the adverse party, it is per-"missible to prove as between the same parties what "such witness testified on the former examination."

In *Aulger* v. *Smith*, 34 Illinois, 537, it is said:

"Where the deposition of a witness, taken and *read* on

"a former trial, is lost, and the *witness dead*, the contents "of such deposition may, when material, be proved by "any person who knows and can testify as to its contents. "There is no difference between lost depositions and any "other written testimony, except that if the witness is liv- "ing, proof of the contents cannot be made, as it would "not be equal, as testimony, to the production of the wit- "ness himself."

To the same effect are

Stout v. *Cook*, 57 Illinois, 386.
Hutchings v. *Corgan*, 59 Illinois, 70.
Mineral Point R. R. v. *Keep*, 22 Illinois, 20.

In *Burton* v. *Driggs*, 20 Wallace, 125, a similar question was presented and disposed of, but the decision seems to rest upon the ground that the objection to the use of the copy of a deposition was too general, and did not raise the point that the witness was not shown to be dead, and that his deposition might be retaken. It also appeared in that case that the copy was made by the clerk of the court, and was sworn to as a true copy, and it was also shown that the witness lived in another state.

In the case at bar the objections made to the use of the copy are, unlike the one made in *Barton* v. *Driggs*, precise and specific. They are—

"To the reading of which copy in evidence the defen- "dant objected, because the copy was secondary, and not "the best evidence; because it was not proven that said "witnesses were dead or incompetent to testify, and that "their depositions could not be retaken; because no rea- "son was shown why their depositions could not have "been retaken after the fire; because said copy has not

"been placed on file in this cause under any order of this "court, nor restored to the files by any proceedings, had "under any statute of the United States, or of the State "of Illinois; because said copy has no certificate thereto "of its genuineness whatever, nor any certificate at all, "and does not purport on its face to be a copy." (Rec., 24; fol., 53.)

It does not appear in the record where these witnesses, Middleton and Collard, lived at any time, only that their original depositions were taken at Washington on September 21, 1870. It is stated that the original depositions were taken *de bene esse*, but there is nothing to show that they were regularly taken, in which respect, also, this case differs from *Barton* v. *Driggs*.

If it be suggested that consent was given by defendant's attorney to placing the copy on file, without any further agreement as to its use as evidence, it does not follow that proof of the above mentioned prerequisites to the use of the copy in evidence was thereby waived. Such consent cannot be construed to imply anything more than that the copy was a true copy of the original depositions. Proofs as to death, insanity, incompetency of the witnesses or inability to retake their depositions were in nowise dispensed with by the admission that such copy was a correct copy.

There being no act of congress, authorizing the use of such a copy of a deposition in evidence, nor agreement of the defendant to such use, it is plain that the common law rule, that secondary evidence of what the witnesses testified to could not be resorted to without first establishing by proof that the witnesses were dead, insane, incompetent to testify, or could not be had. No

such proof was offered. Even their residence at the time of the trial and prior thereto was not shown. It does not follow, from the statement in the copy, that the depositions were taken at Washington, that the witnesses resided there at the time of the trial, nine years after the alleged taking of the depositions.

Depositions are regarded as secondary evidence, and permissible only by virtute of a statute, and under the circumstances stated in the statute. The rule, requiring the best evidence attainable to be used on the trial of the cause, demands that the witness, who is apparently in life, should be produced not to testify to what he at one time deposed in a deposition, but to testify to what he knows at the time of the trial. When the witness lives at a certain distance, is sick, infirm, or otherwise comes within the provisions of the statute, his deposition may be taken and read in lieu of his production in person and oral evidence on the trial. But this secondary evidence, namely, a deposition taken out of court, cannot be resorted to unless taken under the terms of the statute. The statutes, however, provide for no other substitution for the oral testimony of a witness in open court, than his original deposition taken out of court. Neither statute nor common law rules provide for the use in evidence of a still lower grade of testimony, such as a copy of a deposition, until it appears at least by evidence that the witness cannot be produced in court, or that a new deposition cannot be obtained from him. Secondary evidence of the contents of lost or destroyed depositions ought not to be allowed to be used, except in cases of absolute necessity, and not then without full preliminary proofs that the witness, who gave the deposition, is dead, or insane, or that for some good reason if he lives without the jurisdic-

tion of the court, his deposition could not have been retaken.

In this case all these safeguards against an improper use of copies of destroyed depositions were not only ignored by the court, but were by it refused to be applied when urged by the defendant.

The objections, urged to the use of the copy of Middleton and Collard's depositions, apply with still more force to that part of Hyde's deposition, in which he undertakes to give from a rough memorandum of his own the contents of the destroyed deposition of H. H. Boone, concerning the signature of the subscribing witness, Cassin. Here, as in the case of Middleton and Collard, there was no preliminary proof that the witness Boone was dead, or that her deposition could not have been retaken by the plaintiff. On the contrary, it appears in evidence from an original deposition of this same witness, Boone, taken by defendant in 1875, that she was not only alive in 1875, but in reasonably good health, and nothing appears to show that she was not alive in 1879, at the time of the trial. (Rec., 29, fol. 67.)

The part of Hyde's deposition objected to, reads:

"That he has a rough memorandum of the testimony "of said Henrietta H. Boone, which enables him to state "that he exhibited to her the original deed from John J. "Dunbar to William Prout, when she testified that she lived "in Washington, D. C.; was then (in 1872) fifty-nine years "of age; was well acquainted with Joseph Cassin, for- "merly of Washington, who had died many years before; "that she had many opportunities of becoming familiar "with the handwriting of said Cassin, being intimately ac- "quainted with his family, and having often seen him write,

"and having also seen his letters to the family, and that "she was able to identify it; that she looked at said original "deed from Dunbar to Prout, and recognized as genuine "the signature of Cassin in three places in said deed, as "a witness to Dunbar's signature; that in two of the "places the signature which she recognized was written "after that of Samuel W. Smallwood, and in another it "stood alone as a witness to a receipt, and that from her "personal recollection and from comparison of Cassin's "signature of undoubted genuineness, she was sure that the "signatures on the deed purporting to be his, were genuine." (Rec., 26, fol. 59.)

This deposition, to the contents of which Hyde deposed from his rough memorandum, appears to have been taken in 1872, *de bene esse* without notice to the defendant, and without any cross-examination. Taken in connection with the testimony of Mrs. Boone herself, given below, it is a gross misstatement of what her former testimony actually was.

The defendants' objections to the reading in evidence of so much of Hyde's testimony as related to the contents of the deposition of H. H. Boone, were: "Because it "was incompetent and secondary evidence; because no "foundation had been laid for such evidence, by proof "that the said Boone was dead or otherwise incompetent "to testify, or other reason shown why her deposition had "not been taken." (Rec., 26, fol. 60.)

Now, to illustrate the dangerous character of this species of secondary testimony, and the necessity of prudence and caution in allowing the contents of a lost deposition to be sworn to, after the lapse of years, and from rough memoranda, not shown when made, we append the

testimony of Mrs. Boone herself, in which she details such a state of facts as renders portions of Hyde's version of her former testimony highly improbable.

Mrs. Boone, in her deposition, taken by defendant, June 8th, 1875, says:

"That she knew Joseph Cassin in his lifetime; that he was "a purser in the navy, and lived in Washington when she "was a child; also in the navy-yard at Gosport; that he was "her uncle, and that he died of yellow fever in 1822, near "the Gulf of Mexico, while he was on duty as an officer of "the navy; that when he died she was about eight years "old; *that she has no recollection of ever having seen him "write;* she was too young; *that she would not of her own "personal knowledge, know his handwriting;* she only "knew it by what she had been taught; that her depo- "sition had been taken in this case, about the year 1871; "that her health then was weak, and that she had had an "attack of paralysis in December, 1870, which affected her "mind and health for several months; *that when her depo- "sition was taken, her mind and health were severely affected "by said attack;* that said deposition was taken by Mr. "Hyde, in January or February, 1871; *and she was not, "when it was taken, in a condition to read papers and un- "derstand their contents;* could understand what was read "to her; that she saw an old deed at the time her depo- "sition was taken, but *did not read it;* only heard it read; "that she saw her uncle's signature to the deed, and com- "pared it with a letter signed by him which she has, and "which she has always heard and believed to be his; that "her health is now reasonably good, but when her depo- "sition was taken by Mr. Hyde, in 1871, she sat propped "up in a chair and was not able to stand."

On cross-examination she stated:

"That Mr. Hyde exhibited to her an old deed, which "she was informed was from Dunbar to Prout; *that "Cassin's signature occurred on it once, but whether more "than once she could not say;* that the signature she com- "pared with that to the letter, which was from her uncle, "Joseph Cassin, to her father, and satisfied herself that "the signature on the deed was his, and that she had no "doubt then as to its genuineness."

And on re-direct she stated:

"That she never saw the old deed but once, and then "she could not read, though she could examine pictures, "and compare pictures or signatures." (Rec., 29, 30; fol. 67, 68.)

Her statement shows that Hyde's statement that she had often seen Cassin write, and had had many opportunities of seeing him write, and that she testified to these signatures in the deed, must be incorrect, for she herself declares that Cassin died at a distance when she was only eight years old; that she never saw him write; did not personally know his handwriting; only got her information by comparing the signature on the deed to his purported signature to a letter; did not testify to but one signature, and testified at a time when her mind and eyesight were enfeebled by a stroke of paralysis.

For the reasons urged above, we insist that there was material error in allowing the copy of the depositions of Middleton and Collard, and Hyde's version of the contents of Mrs. Boone's deposition, to be read in evidence.

Objections were also made to admitting so much of Corcoran's deposition as related to the payment of taxes,

and also to certain tax receipts and transcripts concerning taxes, offered by the plaintiffs below.

1. *To Corcoran's testimony.* Because it was apparent from the whole of said deposition, that said Corcoran had no personal knowledge of such payment of taxes, except from information of his agents, and that such testimony was secondary, hearsay and incompetent, unless coupled with the evidence of such agents, and because the tax receipts, referred to by the witness, were not properly proved and identified, and their contents established. (Rec., 25; folio 57.)

Corcoran testified, in this respect, "that he paid taxes "on said land *through agents*, for the years 1848, 1849, "1850 to 1868, inclusive, and until he conveyed the land "to Wm. B. Morris, *but which of his several agents paid* "*said annual taxes he could not state; that he had various* "*agents who paid taxes for him in Illinois, but that he* "*confided that business to Anthony Hyde, in Washington,* "*and did not keep himself informed as to the agents else-* "*where;* * * that he sent the original tax receipts for "the years 1847 to 1864, inclusive, to his agent in Octo- "ber, 1869, *and has not seen them since.*" (Rec., 25; folio 56.)

2. *To Hyde's testimony*, concerning payment of taxes for other years than 1847 and 1864, "because the "same was hearsay and was not coupled with or fol- "lowed by the testimony of the parties actually making "such payments, nor by proof of the contents of the tax "receipts, and of their authenticity." (Rec., 26; folio 60.)

Hyde deposed as to taxes: "That he has attended "to the payment of taxes and the appointment of agents, "under Corcoran's directions, as to the lands in gen-

"eral, and the tract in suit; * * that the "principal agents through whom the taxes on the land in "question were paid, lived in Illinois; that he had for a "year or two, paid them directly to the county officers, "but he could not speak certainly, as the tax receipts, "which show who paid the taxes, were burned, as he is "informed, in the Chicago fire in 1871; that these re-"ceipts were for the years 1848 to 1863 inclusive, and "1865, 1866 and 1867, and were paid for by funds of "Corcoran's; that he paid the taxes for Corcoran in "Stark county, Illinois, or had it done, for 1847 and 1864, "but could not say whether the tract in controversy was "included in the receipts for those years; that the origi-"nal tax receipts from 1847 to 1863 inclusive, were sent "to Corcoran's agent, S. L. Somers, in October, 1869." (Rec., 26, fol. 59, 60.)

3. *To the duplicate tax receipts.* The signatures to four of said papers were proved. The signatures to the remainder were not proved, nor was any proof offered as to the official capacity of the signers. The objections were, "because the handwriting of the person signing "said papers, excepting said four papers, had not been "proven, and because no proof that the alleged signers "of any of said papers were acting under any official au-"thority when said papers were made." (Rec., 27, fol. 61.)

Tax receipts are not records, nor copies of records. Their validity depends upon their genuineness, and the authority of the person making them. They are not authenticated even by any certificate made evidence by statute. Even a deed without a sufficient acknowledgment must be proved by oral evidence as to the signa-

ture of the grantor. There is no statute in Illinois making tax receipts evidence *per se;* they are of a low grade of testimony, and like other receipts, may be contradicted or explained by parol.

Elston v. *Kennicott*, 52 Illinois, 272.

We know of no rule of evidence which admits them, unaccompanied by proof as to the authority of the person issuing them, and the genuineness of the signature. Nor will a court take judicial notice of the existence of subordinate and local officers, like the collectors of taxes in such small subdivisions as towns in a county; though in the same state it must be proved.

1 Wharton's Ev., Sec., 337.

A court will not take judicial notice even of deputy marshals and sheriffs.

1 Gr. Ev., Sec. 6, p. 9.

In fact, it does not appear in this record, who signed these duplicate receipts, nor that they were signed by any one professing to act in an official capacity.

4. *To the certified copies of entries in tax collectors' books.* Objected to on the ground "that said transcript "was secondary, and not the best evidence; because "there was no statute or other law requiring such entries "to be made; that neither the transcript nor the originals "were competent evidence that the taxes were paid by "the persons named in said entries; also, because there "was no evidence showing by whom and when said entries "concerning payment were made, nor that the same were "made by the collector of taxes, and also that the certifi-"cate appended to the copy was not competent evidence "that such entries were made by the collector of taxes;

"also, that there was no statute authorizing such certifi-
"cate, nor the use in evidence of said certified copies,
"and particularly of said entries 'by whom paid,' without
"proof." (Rec., 28, fol. 64.)

The copies referred to are set out on pages 27 and 28 of the printed record.

There is no statute in Illinois making such books evidence. They are not the records of a court. The clerk of the County court acts in a double capacity, as clerk of the County or Probate court, and as clerk *ex officio* of the county board, or board of supervisors. The tax books, when returned by the town collectors to the county collector, and through the latter to the county clerk, form no part of the records of the county court. The statute concerning payment of taxes does not specify that the name of the person paying the tax shall be entered in the collector's list. The fact that the tax is paid only is required to be entered. See Sec. 183, Gross' Stat. Ills. 1871, chap. 89, page 608.

Again: the entries on the transcript show that taxes were paid by J. W. Henderson for 1847; for 1848 by "C. & C."; for 1849 to 1858 inclusive, and for 1860, 1861 and 1862 by J. C. Conklin; and there is no evidence in the record that either Henderson or Conklin or C. & C. made these payments for Corcoran or on anybody's behalf but themselves.

It is proper to say, that these attempts to prove payments of taxes were not made for the purpose of showing title in the plaintiffs under color of title, accompanied with possession for seven successive years, or to establish any claim whatever under the limitation laws of Illinois. The evidence shows that the plaintiffs and their alleged

grantors never had possession of the land in controversy. Corcoran, at one time, made out a lease, but nothing was ever done under it, nor anything done towards taking possession. (Rec., 30, folio 68.)

The questions, raised under the tenth and eleventh assignments of error, consist in that the court admitted in evidence a power of attorney and deed from certain persons, and among these, four named Kirby and Putnam, without any proof as to their identity with the heirs of Joseph Duncan, and in that the court, without any such evidence of identity, assumed and stated to the jury that these persons were the heirs of Joseph Duncan, and as such executed the muniments of title, copies of which were offered.

The objection to the evidence was, that the documents were not accompanied with any evidence or offer to prove that the grantors were connected with or held title to the land under the Joseph Duncan mentioned in the decree. (Rec., 16, fol. 36, 37.)

That part of the charge, objected to and concerning this, was: "The plaintiff also introduced evidence to show that on the 29th of April, 1865, the widow and heirs of Joseph Duncan constituted one Otis Turner, their attorney in fact, to convey the land in question, and that in pursuance of that conveyance, Turner made a deed on the 8th of March, 1865, to Richard Lloyd, of the land in question." (Rec., 31; fol. 72.)

There is no recital even in these documents, that the Kirbys and Putnams were heirs of Joseph Duncan, nor is there, in any part of the record, any evidence tending to show that they were. The court assumed that they were, and so charged the jury, without any evidence before it on which to base the statement.

If the grantors in these deeds had all been of the same names as those, named in the decree as defendants, it might be presumed that they were the same persons. (33 Illinois, 339.) But the names of Kirby and Putnam being essentially different from that of Duncan, no such presumption arises.

McMinn v. *Whelan*, 27 Cal., 300.
Elzworth v. *Moore*, 5 Ia. (Clarke), 486.
Busford v. *McCue*, 53 Pa. St., 427.

Nor in the absence of proof will the law presume that certain female defendants in the decree, named Duncan, afterwards married and assumed the names of Kirby and Putnam. The law cannot make maiden ladies *femmes covert* by mere presumption and without their consent.

Erskine v. *Davis*, 25 Ill., 251–2.

IV.

THE IDENTITY OF THE GRANTOR IN THE PROUT DEED WAS NOT PROVEN. THE CONTENTS OF THIS DEED WERE NOT PROVEN BY THE BEST EVIDENCE ACCESSIBLE. THE COURT ERRED IN OVERRULING THE OBJECTIONS MADE TO THE GRADE OF TESTIMONY, OFFERED TO PROVE SUCH CONTENTS. THE EXECUTION OF THE ALLEGED DEED FROM DUNCAN TO PROUT WAS NOT SUFFICIENLY PROVEN TO ENTITLE IT, OR TESTIMONY OF ITS CONTENTS, TO BE INTRODUCED IN EVIDENCE.

That there was such a deed made by Dunbar, and that it was acknowledged by him so as to obviate proof of handwriting was attempted to be shown in the first place by

the certified copy offered. The court held, and in its charge repeats, that the alleged conveyance was not properly acknowledged. For the reasons urged under the second point in this brief, this copy was not competent evidence of the execution of this deed.

The plaintiffs sought next to prove the execution of the deed by offering the copies of the depositions of Middleton and Collard as proof of the handwriting of Smallwood, a subscribing witness, and Hyde's testimony as to the contents of Boone's deposition concerning the handwriting of Cassin, another subscribing witness.

If the objections urged in this brief to the use of these copies, and to Hyde's testimony are well taken, there is absolutely no legitimate evidence left in the record tending to prove the execution of the original deed, beyond the statement in Boone's second deposition concerning Cassin's signature, and her testimony was so vague and uncertain, that it became a fair subject of discussion before the jury whether, under the circumstances to which she testifies, Cassin's handwriting had been sufficiently established. It was a question of fact for the jury to decide. It was for them to decide how much weight should be given to her evidence, and whether or not in connection with the evidence, that Cassin was in the Mediteranean sea on the very day when the deed purports to have been witnessed, Cassin in fact witnessed the deed. The court deprived defendant's counsel of the jury's decision upon these contested facts, usurped the powers of the jury, and directed the jury to return a verdict for the plaintiffs. (Rec., 33, fol. 77.)

Aside from this, and assuming for the moment, as the court must have done, that the handwriting of one or more of the subscribing witnesses had been proven by

competent evidence, nevertheless, this proof was not accompanied with sufficient evidence as to the *identity* of the alleged grantor, Dunbar.

The common law rule, as stated in Phillips on Evidence, (4th Am. Ed., Cowen, H. & E., pp. 490–505), is that, "where the evidence of none of the subscribing witnesses "is producible, proof of the handwriting of a subscribing "witness will be received. * * If there are several "attesting witnesses, the absence of all must be accounted "for, before evidence of handwriting can be given. * * "It will not be necessary to prove the handwriting of the "party whose signature the instrument purports to bear. "But it is necessary to establish the *identity* of the party, "and to show that the person who executed the instru-"ment is the party to the suit, or the party charged."

In 1 Greenleaf Ev., Vol. 1, Sec. 575, it is said that proof of the handwriting of a subscribing witness will be sufficient, when accompanied with proof of the identity of the party appearing to have executed the instrument.

1 Wharton's Ev., Sec. 701, says: "It does not follow "that, because a document is signed A. B., a particular "A. B. is the signer of the document. Even supposing "the name attached to the document to be genuine, and "not assumed, there may be several persons of the same "name, and the person sued may not be the person who "signed. Hence, in such case, there must be some kind "of identification of the signer." And in section 1273 the same author says: "In cases where it is proved, either "directly or inferentially, that there are several persons, in "the same circle of society, bearing the same name, mere "identity of name, by itself, is not sufficient to establish "identity of person."

While the similarity of the name of the grantor in the deed to Prout with that given in the patent might, under other circumstances than those shown in this case, furnish some evidence as to the identity required by the rules above mentioned, nevertheless, it is insufficient in this case. In this record it appears that John J. Dunbar either made two deeds of the land in suit on the same date, or else that there were two John J. Dunbars claiming to have been privates in the artillery, and to have received a patent for the land.

The deed from Dunbar to Prout is claimed by the plaintiffs to have been dated January 6, 1818. The deed from John J. Dunbar to John Frank, brick maker, of Washington city, in the District of Columbia, appearing in defendant's chain of title, is also dated January 6, 1818; recites that the grantor was a private in the artillery; purports to have been signed, sealed and delivered before two subscribing witnesses on January 6, 1818; is acknowledged in person before two justices of the peace of Washington county, D. C., which acknowledgment is accompanied with a certificate from the clerk of the Circuit court of Washington county to the official authority of these justices, and the genuineness of their signatures. (Rec., 17, 18; fol. 40, 41, 42.)

In addition there was oral evidence that the grantee, John Frank, lived in Washington in January, 1818, was a brick maker and collector of taxes there; lived there all his life; died there in 1825, and in his lifetime owned and claimed to own lands in the military tract of Illinois, and bought many soldiers' claims to lands in the military tract. (Rec., 19 and 20; fol. 44 and 45.)

The fact, that the defendant claimed title to the land under this deed from Dunbar to Frank, was made known

to the court at the commencement of the trial by the affidavit shown on page 11, folio 24 of the printed record, and during the trial by competent evidence of the deed to Frank.

Any presumption, arising from the mere fact that the grantor in the Prout deed purported to be of the same name as the patentee, and that therefore he was the patentee, is dissipated at once in the face of these facts. Under such circumstances, the court ought to have required further evidence that the signer of the Prout deed was the original patentee, or else have left the question involved as to whether there was sufficient proofs of execution to the jury to pass upon, and should not have taken it from them.

In Illinois, the rule has been laid down that when the subscribing witness to a deed cannot be produced, the deed may be proven by evidence of the handwriting of both the subscribing witness and the grantor.

Wiley v. *Bean*, 1 Gilman, 305.

To same effect

Spring v. *South Carolina Ins. Co.*, 8 Wheaton, 268.

Davies v. *Davies*, 2 Cranch Ct. Ct., 105.

Again: *the contents of the original deed from Dunbar to Prout were not properly proved, even* if we admit that its execution by the grantor and its destruction were sufficiently established. The best accessible evidence as to these contents was not produced. It appeared to the court, that there was a record of the alleged deed in Madison county, from which an examined copy could have been had. While the certified copy offered was not proper evidence for the jury, it still served to inform the court

that it was within the power of the plaintiffs to have procured a sworn copy of the deed or its record, after having proved the execution of the deed in some legal way.

The original deed not being produced, and the reason therefor, viz., its destruction by fire having been shown, it was competent to prove the contents by secondary evidence. The secondary evidence offered was the certified copy and the evidence of Mr. Dent, that he believed the original deed corresponded substantially in contents to the copy offered. But Mr. Dent did not orally testify to the contents of the original deed, nor attempt to do so; he simply referred to the copy, and left it to that document to prove the contents. He says he did not compare the original with the copy, and did not make the copy. Of course he could not have made this comparison, for the simple reason that the original was burned in 1871, and the copy was not made until 1875, and then only from a purported record.

This certified copy from the record was not admissible as secondary evidence, because it disclosed that the deed was not properly acknowledged or proved, and lacked a certificate of magistracy, as shown under a previous point in this brief. Nor was it admissible, coupled with the oral evidence of Mr. Dent, because it was not an examined copy. The witness, who made the copy, was not produced. Though sought to be supported by Dent's evidence, it was not the best attainable secondary evidence. The best attainable evidence was the record itself, in Madison county, or a sworn examined copy of that record.

There are grades or degrees in secondary evidence, as has often been held in this and other courts. The principle, established in this court as to secondary evidence is,

that it must be the best that the party has it in his power to produce.

Cornett v. *Williams*, 20 Wallace, 246.

And so in Illinois.

Mariner v. *Saunders*, 5 Gilman (Ill.), 121.

In *Riggs* v. *Taylor*, 9 Wheaton, 483, it is held:

"The general rule of evidence is, if a party intend to "use a deed in evidence he ought to produce the original, "if he has it in his possession; but * * if the original "is lost or destroyed, secondary evidence, *which is the best "that the nature of the case allows*, will, in that case, be ad- "mitted. The party, after proving any of these circum- "stances, to account for the absence of the original, may "read a counterpart, or, if there is no counterpart, *an "examined copy*, or if there should not be an examined "copy, he may *give parol evidence* of the contents."

A case in Illinois, *Mariner* v. *Saunders*, 5 Gilman, 121, 122, 123, quite similar to the case at bar, well illustrates the point here made.

The court say: "Nor do we think the contents of "these deeds properly proved, admitting their loss and ex- "ecution to have been established. The position assumed "by the counsel, that there are no grades or degrees in "secondary evidence, cannot be sustained upon principle "or by authority. The books abound with decisions "expressly holding that the best accessible evidence must "be produced, whether it be of a primary or secondary "character." [Here authorities are cited.] "There is no "case where the reason of the rule that the best attain- "able evidence should be produced applies with more "force than in the proof of the contents of lost papers,

" nor is there any case where parol proof is more unsatis-
" factory or more likely to do injustice. * *

" In this case it did appear pretty satisfactorily that bet-
" ter evidence could have been produced of the contents
" of these deeds than the recollection of Mooney. *Before*
" *this class of secondary evidence was resorted to, the plain-*
" *tiff offered a certified transcript of the record of these*
" *deeds from the recorder's office for the purpose of proving*
" *not only the contents, but the execution of the originals,*
" *which were ruled out because the record did not show that*
" THEY WERE PROPERLY ACKNOWLEDGED OR PROVED.
" While these were not proper evidence for the jury, they
" still served to inform the court that it was probably
" within the power of the party *to have procured sworn*
" *copies of the deeds*, after having proved their execution in
" some legal way. * * We are opinion that the plain-
" tiff *ought to have been required to produce sworn copies*,
" or show that the person who copied them into the re-
" corder's books was dead, or could not be produced, be-
" fore allowing Mooney to speak of their contents."

We say, therefore, that the contents of the Dunbar deed to Prout were not shown by competent evidence.

Because a sworn, examined copy of the record in Madison county was easily attainable, and was not produced.

Because the evidence, used to show the contents of that deed, was not the best grade of evidence that should have been offered.

Because the certified copy was not a sworn, examined copy, and was not such an exemplification of a record as the statute permits to be used in lieu of the record.

V.

THE DEED FROM DUNBAR TO PROUT, UNDER THE EVIDENCE, WAS NOT ADMISSIBLE AS AN ANCIENT DEED.

The court did not charge that the original deed from Dunbar to Prout was an ancient deed, nor admit the evidence as to its contents on that ground. If it be urged here that it was such, we insist that the proofs in this record do not establish it to be an ancient deed, which requires no proof of its execution. It was not accompanied by those proofs and *indicia*, which are required to enable an ancient deed to prove itself.

1. A deed offered as an ancient deed, without proof of its execution, must be proven to have existed for thirty years. Less time than that period will not suffice.

1 Wharton's Evidence, Sec. 194.
Jackson v. *Blanshan*, 3 Johnson, 297, 298.

The mere production of a deed, bearing date more than thirty years ago, is not sufficient to raise a presumption of genuineness.

Smith v. *Rankin*, 20 Illinois, 14, 20.
Jackson v. *Luquere*, 5 Cowen, 221.
Jackson v. *Blanshan*, 3 Johnson, 297.

There is no evidence in this case, that the deed from Dunbar to Prout existed prior to 1869. Mr. Dent says he had it in his possession prior to 1871, but how long before he does not state. Mr. Hyde says he sent the deed to Chicago in 1870, but furnishes no evidence as to the deed prior to that year. Mrs. Boone says a deed was shown to her in 1872, but she did not read it. Mr. Corcoran makes no mention of it in his deposition.

Middleton and Collard, if the copy of their depositions is admissible at all, saw it only in 1870. Proof, outside of the certified copy, of the existence of this deed, and of its being in the custody of the proper persons, for the period of thirty years before the time of the trial, is wanting in this record. The fact, if proven legitimately, that Mrs. Boone may have seen Cassin's name on a paper, is of but very slight weight, as she did not read the paper, had never seen Cassin write, and was not in such mental or physical condition, as she herself testifies, to give any satisfactory evidence concerning any person's handwriting, and what she did state was obtained from comparison with a letter, which method of proving handwriting has always been condemned as incompetent.

So far as this record goes, there is no evidence that the deed really existed prior to 1869, or more than ten years prior to the trial.

2. Nor was any possession whatever of the land in controversy, and alleged to have been granted by this deed, shown in evidence. Neither the plaintiffs below, nor any person holding under the Prout deed, ever went into such possession. Corcoran says he made a lease of the land in 1859, but fails to state whether any act was ever done it; and, in fact, the evidence shows that nothing was ever done under this lease. (Rec., 30; fol., 68.) This circumstance of possession for a long continued period, which has usually been required to be furnished, and to accompany an alleged ancient deed, is entirely wanting in this case.

Some of the cases hold, that proof of such long continued possession is indispensable, and that an ancient deed cannot be admitted as such without such evidence of pos-

session. Some authorities say the possession must be for thirty years.

Lessee of Clarke v. *Courtney*, 5 Peters, 344.
Fell v. *Young*, 63 Illinois, 109.

In *Jackson* v. *Blanshan*, 3 Johnson's Rep., 297, it is said as to proof of an ancient deed, that "it is the accom-"panying possession alone which establishes the presump-"tion of authority in an ancient deed. Where possession "fails, the presumption in its favor fails also. The length "of the date will not help the deed, for if that was suffi-"cient, a knave would have nothing to do but to forge a "deed with a very ancient date."

3. The certificate of the recorder of Madison county to the certified copy of the record of the Prout deed, and the copy itself, were not evidence of the contents of the deed and the indorsements on the deed set out in the copy. The recorder had no legal authority for recording the alleged deed, because it was not executed and acknowledged according to the laws of Illinois, and because the statute does not allow the use of such a certified copy and certificate, unless the record shows that the deed was executed and acknowledged in conformity with those laws. Official certificates from a recorder are only evidence by force of a statute making them such, and in cases where the record shows that the deed is executed and acknowledged in the mode prescribed by the statute. It is so held in the precisely similar case of

Smith v. *Rankin*, 20 Ill., 22.

See also

1 Wharton's Evidence, Sec. 115.
Younge v. *Guilbeau*, 3 Wallace, 636, 640.

4. The memoranda and indorsements disclosed in the copy are not of a character to create much reliance in their genuineness. The acknowledgment is informal and defective, lacks the name of the county in its venue, and purports to be signed by Dunbar himself, and has an unfilled blank in its statement as to the signer. The deed in its body has five unfilled blanks. It is signed by John *I.* Dunbar. In the three other places at the foot of the memoranda or indorsements where the name appears, it is given as John J. Dunbar, and in these three places he signs with his mark. It is somewhat remarkable that he should have been able to sign the alleged deed, and in the three other places have been able only to make his mark. The words at the bottom, "Recorded "June 23d, 1818," are not signed by any person, or otherwise shown to have been officially made.

The rule in Illinois is, that "before an ancient deed can "be admitted in evidence without proof of execution, it "must appear that the instrument came from such "custody as to show a reasonable presumption of its "genuineness, *and facts and circumstances must be proven* "*which will establish the fact that the instrument has been* "*in existence the length of time indicated by its date*," and must be "entirely free from any just ground of suspicion."

Whitman v. *Henneberry*, 73 Ill., 111, 112.

VI.

THE EVIDENCE AS TO A RECORDING OF THE PROUT DEED WAS INCOMPETENT. THE COURT ERRED IN ITS RULINGS AND IN ITS CHARGE AS TO THIS EVIDENCE. THE ALLEGED REGISTRY WAS VOID AND FURNISHED NO CONSTRUCTIVE NOTICE OF THE EXISTENCE OF THIS DEED.

I.

Let it be supposed, however, that the death of Morris was shown by competent evidence; suppose that the execution of the deed from Dunbar to Prout was established either on the ground of its being an ancient deed or by the proofs furnished by the depositions, and that the contents of the deed can be assumed to have been shown by the oral evidence of Mr. Dent. Let us suppose all these things for the moment, and still there is no legitimate evidence in this case that the plaintiff's title, derived under the deed from Dunbar to Prout, is entitled to priority over the title, derived under the deed from Dunbar to Frank. There is no legitimate evidence that the Prout deed was recorded before the Frank deed; in fact no legitimate evidence whetever that the Prout deed ever was recorded. There is no testimony as to its being recorded, outside of the incompetent, certified copy from the records of Madison county. The proof of recording rests solely upon this document.

We have under a preceding head pointed out wherein this document was improperly admitted in evidence. The objections to its admission in the court below to its use to show a recording appear on pages 23 and 29 of the printed record, are full and specific, and raise the question squarely that the document was incompetent to show

recording, on the double ground of its not being authorized by statute, and of being only secondary evidence, and not the best even of that sort of evidence.

No oral evidence of the deed being recorded was given. Mr. Dent's evidence does not cover the question of recording, and does not even refer to it. Even if it can be inferred from his rather general statement, to wit, that the burned up deed corresponded substantially in *contents* to the copy, that he intended it to be broad enough to cover an endorsement on the deed outside of its contents, an assumption, however, which is not warranted by his testimony; even then the endorsement "Recorded June 23d, 1818," being unsigned and without venue, fails to inform us where it was recorded and by whom. If the original deed had been put in evidence with this endorsement only upon it, no person could have told, from such endorsement alone, by whom nor when it was recorded, whether in Illinois or in the District of Columbia. It is also evident from the copy, that the statement above quoted appears only in the record in Madison county, was put there as a memorandum by somebody doing the recording, and formed no part of the deed.

It is clear that the only evidence of any recording of the Prout deed is furnished by this certified copy.

That it was incompetent evidence to show a recording in Madison county, because the record fails to show due execution and acknowledgment of the original deed and the indispensable accompaniment of a certificate of magistracy, we have argued at length under a previous head. And that a certificate, on the back even of an original deed, improperly acknowledged, though made by the recorder in due form, and showing all the particulars of

when, where and by whom recorded, is not competent to prove the recording, fully illustrated by an Illinois case, which is, in this respect, on all-fours with the one at bar.

In *Smith* v. *Rankin*, 20 Ill., 19, 22, the Supreme court of Illinois, after holding that the certificate of acknowledgment to a deed was insufficient, speaking of the certificate endorsed on the deed by the recorder of this same Madison county, say, on page 22:

"And the same may be said of the certificate of the re-
"corder of Madison. He had no legal authority for re-
"cording the document, and hence the record was void.
"It was not a record, and *hence he could, by his certificate,*
"*make no competent evidence in relation to it.* He might
"have as well have recorded an ancient ballad and cer-
"tified the fact, and thereby proved the existence of the
"old song at that time. It must be remembered that offi-
"cial certificates are only evidence by force of private
"law, and that except where they are by law declared to
"be evidence, they are not proof of what they certify to."

If it be asked here, how otherwise than by a certified copy can it be shown that a deed appears of record in Madison county, we answer, that it can be shown in the same way that it has been done before in Illinois under similar circumstances—by producing the record or a sworn, examined copy from the record, by oral evidence in court, or by deposition as to the age of the book of records, as to the position of the deed in question in such book, and other circumstances tending to show for how long a time it has been recorded.

On this the same case, pages 22 and 23, says:

"If the certificate of Rundle is genuine" (this was an endorsement on the deed, giving full particulars when,

where and by whom recorded) "that this same deed was "spread upon the records of that county, and although not "authorized by law to be recorded, if an exact copy of this "deed be actually there found, in a place in the record "book, it would show very satisfactorily that there was an "original paper in existence at that time corresponding to "the one produced, and which might reasonably be in- "ferred to be the same. It is no answer to say that these "things were proved by the certificates themselves. * * * "It was not beyond the reach of the party to prove there "are such records, or entries purporting to be such rec- "ords, in the old record books, and as they would have "afforded evidence tending to prove the fact that the deed "produced was actually in existence in 1819 and 1820, it "was the duty of the party to produce it. Surely, when "the party is asking the court to dispense with the gen- "eral rule of law and to presume so much in his favor as "to admit his deed on trust or on mere suspicion, he "ought to do everything which it is in his power to do to "satisfy the court that the deed is genuine. * * If there "ever was a case where the party should exhaust every "effort to satisfy the court that the presumption which he "asks the court to draw in his favor, that his deed is gen- "uine, it is a case of this sort, where at least we can never "feel satisfied that we are not lending our aid to fraud and "forgery. * * Without saying, at this time, when we "will or will not admit papers as ancient deeds without "proof of their execution, it is sufficient to say that we "are very clear that these deeds were improperly ad- "mitted." * *

The mode of proof indicated above was observed in the case of

Whitman v. *Heneberry*, 73 Ill., 113.

Striking out the certified copy of the Prout deed as incompetent evidence of the contents of that deed and of its recording, and admitting for argument's sake that the contents of the deed were somehow and in an uncertain manner got before the court by the aid of Dent's oral testimony, it follows that the fact of the recording in Madison county was not legitimately established.

It so follows, as we have said, from the undisputed facts in the record, that when that paper is rejected as incompetent evidence of the alleged recording, no other evidence can be found showing, or tending to show, that the deed ever was recorded in Madison county, or that it bore any certificate of having been recorded there. Give the broadest scope to Dent's evidence, and infer from it that the original deed had on it the words: "Recorded June 23d, 1818," without any further attestation or statement, and still we have no evidence that such recording was made in Madison county, or in any other specified place, nor by whom it was recorded, whether officially or unofficially.

Under these circumstances and so viewed, the case stands thus: that there were two deeds made by John J. Dunbar of the land in controversy; one to Prout, the other to Frank; that both deeds bear date on the same day, January 6, 1818, and were acknowledged on the same day; that the Prout deed never was recorded, while the Frank deed has been recorded in the proper office in Illinois.

Which of these two deeds was the older one? There is no evidence in the case that the Frank deed was not made on the day of its date, none whatever attacking its genuineness. There is no evidence either that the Prout deed was actually made on the day of its date, other than the date itself.

The law presumes, that a deed was made and delivered on the day of its date, in the absence of evidence to the contrary. This presumption is not overthrown even by the deed being acknowledged or recorded at a later date. Where two deeds bear the same date, and one is acknowledged and recorded at a later day than the other, the presumption is not thereby overthrown, and the deed bearing the later acknowledgment by that fact subordinated to the one first acknowledged. The presumption, arising from the dates, that the deeds were made on January 6, 1818, must stand until the contrary is shown.

Deininger v. *McConnell*, 41 Illinois, 232.
Hardin v. *Osborne*, 60 Illinois, 97.
Jayne v. *Gregg*, 42 Illinois, 416.
Darst v. *Bates*, 51 Illinois, 439, 445.
McConnell v. *Brown*, Litt. Select Cases, 459.

Where two deeds from the same grantor to two different grantees, bear date the same day, the one made first on that day, must have priority, except where rights have been acquired under registry laws. The older one will prevail, unless postponed to the second, by the prior recording of the second. This is the rule in Illinois.

Cobeen v. *Breckenridge*, 48 Illinois, 93, 94.
Noakes v. *Martin*, 15 Illinois, 118.
Deininger v. *McConnell*, 41 Illinois, 231.

Which of these two deeds was the older? Both purporting to have been made on the same day, there is no presumption as to which one is the older. Considering the question outside of the recording acts, and that there is no legitimate evidence in the record that the Prout deed was ever recorded at all in Madison county, it follows that

the plaintiffs, to maintain their case as against the Frank title, should have proven that the Prout deed was executed prior to the Frank deed. They offered no evidence whatever of that.

The burden of proof was on the plaintiffs below to establish that the Prout deed, under which they claimed, was older than the Frank deed. The onus was on them to establish the affirmative, that they were entitled to the land by force of a superior title. Under the rules of evidence, they were bound to establish this affirmative by a preponderance of evidence. Admitting that both deeds are presumed to have been made on their date, and at the same moment, and that the evidence as to priority is thus equally balanced, still the plaintiffs were not entitled to recover. Where the evidence is equally balanced on a given question, the verdict on that question, under all known rules of evidence, must be in favor of the defendant. The defendant in ejectment being in possession, is presumed to be the owner of the fee until plaintiff proves himself to have a title superior, not only to that of the defendant, but to every outstanding title.

In ejectment, it is settled law that the plaintiff must recover on the strength of his own title, and cannot recover unless he proves himself entitled to possession by a preponderance of evidence.

Doty v. *Burdock*, 83 Illinois, 476.
Hague v. *Porter*, 45 Illinois, 318.
Marshall v. *Barr*, 35 Illinois, 108.
Masterson v. *Cheek*, 23 Illinois, 72.

The extraordinary manner, in which the Circuit court disregarded the defendant's claim of title under the Frank deed, as shown by his preliminary affidavit, made

under the provisions of section 25 of the Illinois ejectment act, by allowing the plaintiffs to show title in the first place without connecting with the patentee, and by allowing the gap to be filled by the evidence, complained of, after defendant had shown title under the Frank deed, does not change the rule in regard to the preponderance of evidence. The order of proceeding in admitting evidence into a cause cannot change established rules of evidence as to the weight and effect of the evidence when it is all in, nor put upon a defendant the affirmative of an issue which it is incumbent on the plaintiff to maintain by superior testimony. If the Circuit court is governed by the ejectment statute of Illinois in the trial of ejectment cases in that state, it had no authority under that statute to permit the plaintiffs to proceed in the manner indicated, for section 25 does not dispense with proof of title from the original source, and does not allow the showing of title from a common source subsequent to the patent from the United States, in cases where the defendant declares on affidavit, as was done in this case, that he claims title through a source other, and distinct from the common source, alleged by the plaintiff.

What has been said above is with respect to the proof, required at common law as to which of two deeds, bearing the same date, is the older, and without respect to the effect given by the recording laws of Illinois.

Under the laws of Illinois, actual recording is not required to make a deed valid, as is required in some states. The statutes of 1872, however, provide that a deed may be read in evidence, whether recorded or not; if properly acknowledged, as required by the statute, without other proof; if not so acknowledged, then on proof as at common law. (Sec. 35, Chap. 30, Rev. Stat.) The deed,

when authorized to be recorded, takes effect and is in force from the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice, and is void as to such creditors and subsequent purchasers without notice, until it is filed for record. (Sec. 30, same chapter.) Such notice is given constructively by recording, when it is authorized, and in the right county, and it may be by actual notice such as visible possession, or the like, but proof of actual notice must be clear and positive. *Rogers* v. *Wiley*, 14 Ill., 65. There is a provision in the same statute that a deed when properly recorded shall also be notice thereafter, to subsequent purchasers though not properly acknowledged according to the laws of the state (Sec. 31), but no such provision appears in any statute prior to the year 1837.

The fact that the Frank deed was not recorded in Stark county until 1870 does not affect its validity as a deed. The Supreme court of Illinois, interpreting the act of 1819, which is the same substantially as the act of 1807, in force when the Frank deed was made, say: "The deed was valid as between the parties to it, without "being acknowledged and recorded, and the court had no "right to assume that there was a subsequent purchaser "or mortgagee, so as to render it fraudulent and void "under the statute."

Semple v. *Miles*, 2 Scammon, 316, 317.

Recording of a deed in Illinois is not essential to give it effect to pass the title. Recording only secures the title granted from being defeated by a subsequent sale to a *bona fide* purchaser.

King v. *Gilson*, 32 Illinois, 348, 354.
Ross v. *Hale*, 27 Illinois, 104, 107.

In this case the grantee in the Frank deed is not shown to have been a subsequent purchaser, in the ordinary sense of those words. His deed bearing date the same day as the Prout deed, nothing appears to show that he purchased subsequent to the Prout deed.

If the word "subsequent purchaser" means what it is said and defined to mean in *Doyle* v. *Teas*, 4 Scammon, 252, viz: "The word subsequent, as used in the recording "act, must have reference to the recording, and not to the "date of the instrument; and such, indeed, is its literal "and grammatical construction. As between the grantor "and grantee, the transaction is complete upon the execu- "tion and delivery of the deed; but as between the "grantee and third persons without notice, the purchase "may be said not to be complete till the title paper is left "for record," nevertheless, the case is not brought within the statute. Strike out the evidence offered in this case to prove the recording, as incompetent or insufficient to prove recording in Madison county, and there is no evidence whatever that the Prout deed was ever recorded.

There are no recitals in the plaintiffs' chain of title, beginning with the deed from Prout to Duncan, as shown on page 12, folio 25 of the printed record, which could in any manner put the defendants' landlord or his grantor, Lloyd, on inquiry as to the existence of any deed from the patentee to Prout. Nor are there any such recitals in the documents (Rec., 16) purporting to convey to Lloyd the interest in the land asserted by the Duncans, Kirbys and Putnams. The record will be searched in vain for any sort of constructive notice to Frank, his heirs or their grantees, outside of the alleged recording in Madison county, as shown in the certified copy of the Prout deed. Reject this document as incompetent evidence of the recording,

and no constructive notice of the Prout deed appears in this record.

The fact that these deeds from Prout down to Morris were of record, they not containing any recitals of any conveyance from Dunbar to Prout, would not put even a subsequent purchaser from Dunbar on inquiry, and so furnish notice. The mere fact, that a subsequent purchaser has knowledge that another person holds a prior deed for the same premises, will not put him upon inquiry as to what title the grantor of the prior purchaser may have had. The subsequent purchaser has a right to presume, in the absence of any other information, that whatever title the prior purchaser has is on record, and that he has no title if the record shows none.

St. John v. *Conger*, 40 Ill., 535.
Chicago v. *Witt*, 75 Ill., 212, 213.
Mills v. *Smith*, 8 Wallace, 30, 31.

Recitals in a deed, when they can be used, also are notice only to *subsequent* purchasers. There is no proof that Frank was a subsequent purchaser, his deed bearing date the same day as Prout's, and there being no legitimate proof or presumption in the case as to which is the older. The deed, too, is prior to all the deeds from Prout down to Morris, and as to the grantees in those deeds he was in no sense a subsequent purchaser.

Doolittle v. *Cook*, 75 Ill., 354, 357.
Iglehart v. *Crane*, 42 Ill., 268.

Frank not being a subsequent purchaser, and no actual notice to him of the Prout deed being shown, and no constructive notice to him of any recording of the Prout deed being shown by any valid evidence, his deed is protected and has priority by reason of its record in

Stark county. The grantee of his heirs, Lloyd, therefore, is protected by the position of Frank as a *bona fide* grantee, even though it were shown—which it is not—that Lloyd had actual or constructive notice of the deed to Prout. The converse is also true, that Lloyd, not being shown to have had actual or constructive notice of the deed to Prout, would likewise be protected, even though Frank had not been a *bona fide* purchaser.

Choteau v. *Jones*, 11 Ill., 322.
Kennedy v. *Northrup*, 15 Ill., 156.
Mills v. *Smith*, 8 Wallace, 30, 31.

In the absence of evidence to the contrary, it is to be presumed that Frank purchased in good faith. The deed to him imports good faith until the contrary is proven.

Dickenson v. *Breeder*, 30 Illinois, 280.
Hogden v. *Hennichsen*, 85 Illinois, 259, 262.
McConnell v. *Street*, 17 Illinois, 253.

Delay in recording the deed does not raise any presumption of bad faith.

Rawson v. *Fox*, 65 Illinois, 200.

The recital in the deed of the payment of a consideration by the grantee is sufficient evidence that the deed was made for a valuable consideration, until the fact is disproved.

Stone v. *Duvall*, 77 Illinois, 475.

There is, therefore, no legitimate evidence furnished in this case of any constructive notice to the holders under the Frank title of the Prout deed by the recording of the latter deed.

No actual notice to the holders under the Frank title of the existence of any such deed, or of its being re-

corded, is shown in this case. No such claim is made, either through possession or otherwise. That question does not arise on this record.

The alleged record of the Prout deed is not even in the county where the land lies. The land lies in Stark county, and the recording is alleged to have been Madison county.

The rights claimed under the Prout and Frank deed stand thus: The two deeds are to be treated as made on the same day, and in the absence of proof as to which was made first, and in the absence of legitimate evidence that the Prout deed was recorded at all, the Frank deed takes priority over the other, and is the superior title. The recording gives it priority, it being shown in the record to have been recorded in Stark county. The statute in such case gives to the title, derived from Frank, precedence over the title derived under Prout.

McConnell v. *Reed*, 4 Scammon, 117.
Noakes v. *Martin*, 15 Illinois, 118.
Deininger v. *McConnell*, 41 Illinois, 232.
Mills v. *Smith*, 8 Wallace, 27.

Thus much has been urged to show how important and material in this case are the objections to the rulings of the court below, in admitting the evidence as to recording, and to the charge of the court, in which the jury were informed that the Prout deed was not so acknowledged as to entitle it to record, and then in the next breath were told that the deed was actually put of record in Madison county on June 23, 1818.

How was the court informed, that the deed was recorded, except from the statement made in the certified copy? By what authority did the court assume even from

this unsigned statement, that the recording took place in Madison county?

The certified copy, containing the statement as to recording, was not proven to be a sworn, examined copy of any record. It was not admissible in evidence to the jury under any statute of the state. It failed to show, that the purported deed had been executed and acknowledged and attested by a certificate as to the authority of the justice, purporting to take the acknowledgment, in such manner as to entitle plaintiffs to use such copy under the state statute, as evidence on the merits. As was said in *Mariner* v. *Saunders*, 5 Gilman, 121, cited *ante*, it was sufficient to inform the court, that plaintiffs could produce better evidence in the shape of an examined copy, but it was not evidence on the merits. The court, however, ruled that it was competent evidence for the jury, and admitted it for that purpose. The court went further, and ruled not only that the document was competent evidence on the merits, but also that the Prout deed was thereby proved to have been actually recorded in Madison county.

The Circuit court made this question of recording the hinge on which the case turned. If we are right in our propositions as to the incompetency of this certified copy to prove the recording of the Prout deed, the court erred materially in admitting the copy to prove the recording, and in charging the jury, as it did, to find a verdict for the plaintiffs. If we are right in this, the court should have excluded this evidence and charged the jury to find for the defendant.

II.

We go a step further than the evidence in this record, perhaps, renders necessary. We submit that the alleged recording of the deed from Dunbar to Prout, even if it had been proven by competent evidence, cannot be upheld as constructive notice to those holding under the Frank title, for the reason, that the alleged registry of the Prout deed in Madison county, under the law at that time in force, was void, and has not been cured by any subsequent curative act of the State of Illinois. The alleged registry in 1818 was void, and was not notice, because it was not acknowledged before any officer authorized by the laws of the state to take acknowledgments.

Justices of the peace under the act of 1807 were not authorized to take the acknowledgment of this deed. (8 Wallace, 525.) Not being acknowledged in conformity with the statute, it was not entitled to be recorded. This void registry has not been cured and made notice by any subsequent act, for the reason that this registry can not be brought within the provisions of any such curative act.

It will not be denied that the record of an instrument, not entitled to be recorded, is void and cannot avail as notice.

St. John v. *Conger*, 40 Illinois, 535.
Smith v. *Rankin*, 20 Illinois, 23.
Moore v. *Hunter*, 1 Gilman, 317, 331.
James v. *Morey*, 2 Cowen, 246.

Hence, it has been held, that if a deed be recorded without the proof required by law, the registry of it is

void, and that a recorded deed with a defective acknowledgment, or without one, is not notice.

Shults v. *Moore*, 1 McLean, 520, 527.
Noakes v. *Martin*, 15 Illinois, 119.
Smith v. *Rankin*, 20 Illinois, 23.
Nottinger v. *Ware*, 41 Illinois, 250.

In the case of a deed acknowledged before a justice of the peace out of the county where the land lies, the deed and acknowledgment, to complete the proof and entitle the deed to record, must be accompanied by a certificate of the official character of the justice.

Vance v. *Schuyler*, 1 Gilman, 163.
Harding v. *Curtis*, 45 Illinois, 254.
Semple v. *Miles*, 2 Scammon, 317.
Holbrook v. *Nichol*, 36 Illinois, 168.
Carpenter v. *Dexter*, 8 Wallace, 525.
Choteau v. *Jones*, 11 Illinois, 320.
Buckmaster v. *Job*, 15 Illinois, 330.

Under the conveyancing acts of Illinois, no authority was conferred upon justices of the peace, residing out of the state, to take acknowledgments of deeds, until that of January 22, 1829, was passed. By the first section of that act, it was provided:

"Such proofs or acknowledgments may also be made "before any justice of the peace; *but if such justice re-* "*sides out of this state, there shall be added to the deed a* "*certificate of the proper clerk, setting forth that the per-* "*son before whom such proof or acknowledgment was* "*made, was a justice of the peace at the time of making* "*the same.* * * *"

Vol 1 Adams & Durham R. Est. Stat., page 83, Sec. 1.

Every statute on this subject enacted since 1829 contains a similar provision, making a certificate of magistracy an indispensable accompaniment to an acknowedgment, taken by a justice of the peace without the limits of the state.

Act 1847, Sec. 1, 1 Adams & D. R. E. Stat., page 174.

Carpenter v. *Dexter*, 8 Wallace, 525.

Act 1872, Sec. 20, 1 Adams & D. R. E. Stat., page 215.

This record shows that no certificate of magistracy accompanid the deed from Dunbar to Prout. (Rec., 22, 23.) On the other hand, such a certificate does accompany the deed from Dunbar to Frank. (Rec., 18, fol. 42.)

That the alleged recording of the Prout deed in Madison county has not been made notice by any statute since enacted, will appear from an examination of the enactments in question.

1. The act of December 30, 1822 (1 Vol. Adams & D. R. E. S., page 71), does not aid, first, because the act refers only to deeds, acknowledged in another state or territory, and does not in terms, as later acts do, embrace the District of Columbia. Second, because even if the district can be brought within the language of this act, the deed to Prout, lacking the certificate of magistracy, was not acknowledged in conformity with the laws of the district in force, when this deed purports to have been acknowledged. The requirements in the district at that time, as to the acknowlegment of deeds, conveying lands not situated in the county of the acknowledging justices, are fully stated in point two of this brief.

2. The act of January 22, 1829, section 1 (1 Ad. & D. R. E. St., page 83), does not cure, because that act expressly requires that a certificate of magistracy shall accompany the justice's certificate of acknowledgment, when the deed is recorded.

3. Section 5 of the act of January 18, 1833 (1 Ad. & Dur. R. E. S., pages 85, 86), does not help, for that section is construed to apply only to deeds, acknowledged or proven theretofore in conformity with the laws of the state.

Nottinger v. *Ware*, 41 Illinois, 251.

4. The act of July 21, 1837, quoted in 41 Illinois, 249, and found in 1 Ad. and Dur. R. E. S., p. 91, provides: "The recording of any deed, &c., of and concerning "any lands, tenements, or hereditaments, or whereby the "same may be affected in law or equity, whether exe- "cuted within or without the state, by the recorder of the "county in which the lands intended to be affected *are* "*situated*, shall be deemed and taken to be notice to sub- "sequent purchasers and creditors from the date of such "recording, whether the said writing shall have been "acknowledged or proven in conformity with the laws of "the state or not; Provided, that no such writing not "acknowledged or proven in conformity with the laws of "the state, to entitle the same to be recorded, shall be ad- "mitted as evidence in any court, unless execution thereof "be proven in the manner required by the rules of evi- "dence applicable to such writings; and the provisions of "this act shall apply as well to writings heretofore, as "those hereafter admitted to record."

This act is prospective and not retrospective as to notice, and can be made to apply only to a record in the

county where the lands "are situated" at the time of the passage of the act. Notwithstanding the language used, this act only gives effect to the recording of deeds after the passage of the law.

This act has been so construed by the Supreme court of Illinois in *Deininger* v. *McConnell*, 41 Illinois, 233, as follows:

"It is likewise contended that the act of 1837, operates "to cure the defect in the deed of the patentee to Jones. "We do not perceive any language in that act which can "be construed to affect a record of a deed made previous "to that time. It is not retrospective in its language, nor "will it bear such a construction. But if it did, we are at "a loss to perceive how the legislature could transfer one "man's land to another. If Willard, holding the first "deed, was the owner of the land at the date of this "enactment, the legislature had no power to say, that "acts already performed by Jones, which were nugatory, "without any other act being done by either party, should "become operative to transfer Willard's title to Jones.

"But such was not the design of the legislature, "but only to give effect to the recording of deeds after "the passage of the law. The act only declares that in- "struments relating to or affecting real estate when re- "corded, shall be notice, although not properly proved or "acknowledged, but it does not say of deeds previously "recorded that the first placed upon record should, al- "though not entitled at the time to record, be considered "as valid and binding."

Applying this construction to the case at bar, we say that this act does not and cannot validate the nugatory recording of the Prout deed in Madison county to the preju-

dice of the Frank deed. Both deeds bearing date the same day stood as at common law, on an equality. Not being entitled to record, the Prout deed stood in 1837, as if it never had been recorded. It is not in the power of the legislature, by the act in question, to declare that the previous void recording should be valid, and so operate to transfer the title to Prout or his grantees. Nor under the construction given to the act by the state court, is the act to be so construed. It is uniformly held in Illinois, that, the legislature is powerless to declare a void act valid. *McDaniel* v. *Cornell*, 19 Illinois, 227.

This construction by the state court of the act of 1837, establishing a rule of property in Illinois, is binding upon this court.

Kibbe v. *Ditto*, 3 Otto, 680.
Miles v. *Caldwell*, 2 Wallace, 43.
Blanchard v. *Brown*, 3 Wallace, 249.

The act of 1837, is, therefore, prospective only. It cannot declare a prior invalid recording valid. Being prospective, the effect of recording after the act must be gathered from the language used. It is the recording in the county where the lands *are* situated, that is, at the time of the passage of the act, which, it is declared, shall be notice. If the land, in 1837, was not situated in Madison county, the act will not apply, since no other recording than the one in Madison county is even claimed. On the other hand, if this Prout deed had been recorded in Stark county after the formation of that county, the act might apply from and after such formation.

No such evidence of recording the Prout deed in Stark county, however, appears in this record.

Recording only in Madison county was attempted to be

shown in evidence in this case. As a matter of fact, the land in controversy was contained in Putnam county on July 21, 1837, and never after that date in Madison county. Putnam county was made a county in 1825, and the land was from that date contained in it, until 1839, when the present Stark county was formed. The land, since that date, has been within the boundaries of the latter county.

Act M'ch 2, 1839, Illinois Session Laws, 1838–9, 229.

Act Jan. 13, 1825, Ills. Sess. Laws, 1825, 94.

Act Jan. 31, 1821, Creating Pike county, Ill. Sess. Laws, 1821, 59.

It thus appears that ever since 1825, the land in controversy has not been situated in Madison county, and the provision in the act of 1837, that recording in a county where the lands *are situated*, shall be notice, cannot apply to the case at bar, for the simple reason that the language used refers to the county in which the land is situated at the time of the passage of the act, or in which it may thereafter be included. The act does not say in the county in which the lands *were* or *have been situated*, but *are situated.*

The act having only a prospective reach, as construed by the state Supreme court, and using language concerning the location of the land in terms, which exclude the construction that lands are intended to be embraced, in it which formerly lay in some other county than the one in which they lay at the passage of the act, and it appearing also in this case that the lands in question did not lie in Madison county, when the act of 1837 was enacted, and that no recording in either Putnam or Stark county is even

asserted in this case, we submit that the alleged recording, even if properly proved, has not been validated and made notice by the act of 1837.

Under the language of this act, the Prout deed should have been recorded in Putnam or Stark county in order to fall within its terms, the prior recording in Madison county being invalid.

A somewhat similar question arose in *Astor* v. *Wells*, 4 Wheaton, 466, in which a deed of lands lying in Jefferson county, Ohio, was made. A new county, called Tuscarawas, was created partly from Jefferson, after the execution, and before the recording of the deed, in which new county the lands were included by the separation, and the deed was recorded in Jefferson. Held, that this registry was not constructive notice.

The reasoning of the court in that case applies to the question here raised. The invalid recording in Madison county stood as if it had never been made at all. The act of 1837 stepped in and made the Prout deed, though not before entitled to record, notice after July 21, 1837, provided recording of the deed appeared in the county where the land was then situated.

No one was bound to search the records of Madison county, prior to the separation, for deeds not entitled to record there. A purchaser would search the records of Putnam and Stark counties subsequent to the date of the separation, and would not be held to take notice of a deed in Madison county which, when recorded, was not entitled to record there. Nothing short of proof of actual notice will hold a purchaser under such circumstances, the act of 1837 being futile to reach back and validate the prior invalid recording, and being applicable in its scope to deeds not

properly acknowledged, only when a recording appears, at and after the passage of the law, in the county in which the land conveyed is situated. Under the laws of Illinois, no purchaser of land in Putnam or Stark county can reasonably be expected to prosecute a search in Madison county for deeds, not entitled to record before the formation of those counties, for the reason that in 1835 ample provision was made for transcribing from Madison county all records of deeds, affecting lands in those counties, and for giving such transcribed records the same effect as the original records would show.

Act, Feb. 12, 1835; Secs. 7, 8; 1 Adams & Durham R. E. St., p. 87, 88, 89.
Purple's Real Est. Stat., 493, 494.

5. The act of February 26, 1841 (1 Ad. & Dur. R. E. St., 92, 93), does not cure. For that act requires the deed to be acknowledged in conformity with the laws of the district, to be accompanied with a certificate of conformity from the clerk of a court of record of the district, and to be recorded in the county in which the land is situated.

6. Nor does the act of 1845 cure; 1 Adams & Dur. R. E. S., Sec. 16, page 124. This act requires the deed to be properly acknowledged before it is entitled to record, and when acknowledged out of the State, that a certificate of conformity must accompany the certificate of acknowledgment. By section 22, page 134, the deed must be recorded in the county where the land is situated. The 28th section, page 147, provides that a deed shall be notice, from time of filing for record, to subsequent purchasers, though not acknowledged according to law, but is prospective only and taken in connection with section 22, requires the filing for record to be in the county where the land is situate.

7. The deed in question is not cured by section 1 of the act of February 22, 1847 (1 Adams & Dur., 174), for that section expressly requires the acknowledgment of a deed before a justice of the peace out of the state, to be accompanied with a certificate to the justice's authority, from the clerk of a court of record, before it can be entitled to be recorded. Section 3 also requires conformity with the laws of the district, and relates to future recording in the county where the land is situate.

8. Section 5, Act February 15, 1851 (1 Adams & Dur., 179), relates only to acknowledgments in conformity with the laws of the *state* where the deed was executed, does not include the District of Columbia, and requires the accompaniment of a certificate of conformity.

9. The act of February 11, 1853 (1 Adams & Dur., 185), relates solely to deeds executed by husband *and wife*, which is not this case.

These are all the acts having any bearing upon the question. The act of March 29, 1872, the one now in force, was not enacted until nearly two years after the recording of the deed from Dunbar to Frank, in Stark county. Its provisions are substantially the same as those of the act of 1845 and its amendments. They can not, however, affect or relate back so as to change the relative rights of the parties claiming under the Prout and Frank deeds. Those rights must be determined by the laws of the state, as they stood at the time when the Frank deed was recorded.

The plaintiff in error respectfully submits this case, craving the indulgence of the court for the length of this brief, rendered unavoidable by the nature of the questions

involved and the local character of the statutes referred to, and believing that for some if not all of the errors assigned on this record, the judgment of the Circuit court ought, in justice, to be reversed and the cause remanded for a new trial.

GEORGE O. IDE,
Attorney for Plaintiff in Error.

PADDOCK & IDE,
Of Counsel.

108-32

OFFICE SUPREME COURT U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1882.

HOWARD STEBBINS,
Plaintiff in Error,

vs.

MARIA L. DUNCAN ET AL.,
Defendants in Error.

No. 153.

BRIEF OF THOMAS DENT,

OF COUNSEL FOR DEFENDANTS IN ERROR.

PRESS OF BEACH, BARNARD & CO., 104 RANDOLPH STREET, CHICAGO.

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Of Counsel for Defendants in Error.

This is an action of ejectment, which was commenced by William B. Morris, under whom the defendants in error claim title as devisees. The land in controversy is a quarter section, in the county of Stark, in the State of Illinois, in the Military Bounty Tract. The death of the plaintiff, William B. Morris, after issue joined, was suggested in pursuance of the statute. Rev. Statutes Ill., title, "Ejectment," c. 45, section 51. And the court thereupon ordered that his devisees, the present defendants in error, should be made plaintiffs.

This was before the trial sought to be brought under review here. (See page 7 of Transcript of Record, referring to the printed transcript.) An affidavit that the plaintiffs claimed title through a common source with the defendants, was filed under section 25 of the same statute. This affidavit further states on information, &c., that the defendant was at the time of the commencement of the suit in the occupancy of the premises as a tenant of Benson S. Scott, who claimed title from a common source with that of the plaintiff, to wit: under the widow and heirs of Joseph Duncan, deceased.

An affidavit of Richard Lloyd, as agent of the defendant, was thereupon read, to show that the defendant claimed title through another source.

In this affidavit the said Lloyd stated that the defendant claimed title through a source other and different from that claimed by the plaintiff, to wit: a patent from the United States to John J. Dunbar, a deed from Dunbar to Frank, dated January 6th, 1818; a deed from the heirs at law of Frank, to wit: Mary Houston and John H. W. Frank, to Richard Lloyd, dated January 21, 1868, and a deed from the said Lloyd to Benson S. Scott, dated December 9, 1865, and by lease from said Scott to defendant Stebbins, which was unexpired at the date of the commencement of the suit, and that under no other claim or title was the defendant occupying the premises at the time of the commencement of the suit.

I.

The first position in behalf of the defendants in error, plaintiffs in the court below, is that the source of the title of Scott, the landlord of the defendant, being a deed from the widow and certain of the heirs of Joseph Duncan, deceased, the claim of title on the part of plaintiff in error is cut off by a decree and proceedings thereunder to which Duncan's widow and heirs were parties, and that defendant, as a privy, is estopped from denying title in Duncan in opposition to a direct finding in the decree, and is also prevented from setting up an adverse or outstanding title.

To show the application of this position, we rehearse the evidence offered by the plaintiffs upon this theory.

This evidence was: (1) A certified transcript of a deed from William Prout and wife to Joseph Duncan, dated May 2, 1834, and recorded October 29, 1838, introduced without objection. (2) A certified copy of a decree in chancery in the United States Circuit court for the district of Illinois, entered June 9, 1846, in a certain cause wherein The United States of America were plaintiffs, and Elizabeth C. Duncan, Mary Louisa Duncan, Joseph Duncan, Julia Smith Duncan, and others, widow and heirs of Joseph Duncan, deceased, with others, were defendants, which decree found that Joseph Duncan, last named, died seized of the premises in controversy, along with other lands, and appointed William Thomas a Commissioner to make sale of the same, with power to convey to purchasers the lands sold, the deeds to be executed by said Commissioner by the order of the court. Under this decree the proceedings

showed a sale of the premises to the United States, the approval by the court of the Commissioner's acts, a confirmation of the sale, and an order that the Commissioner should deliver a deed to the United States. A certified copy of such deed, which was dated August 12, 1846, and was recorded June 17th, 1848, was then read in evidence. (3) A certified copy of a deed, dated December 28, 1847, executed by R. H. Gillett, Solicitor of the Treasury, on behalf of the United States, pursuant to an act of congress, approved May 29, 1830, to William W. Corcoran, recorded June 5, 1848. (4) A deed from said Corcoran to William B. Morris, dated December 20, 1867, recorded March 12, 1868. The foregoing items of evidence went in without objection. (5) An exemplification from the Probate court of Suffolk county, Massachusetts, of the last will and testament of William B. Morris, and of the letters testamentary thereon, by which last will and testament the defendants in error, plaintiffs in the trial court, became devisees of the property in question, under the residuary clause in said will. (6) A certified copy of a power of attorney, dated August 23, 1864, from Elizabeth C. Duncan, Joseph Duncan, Julia S. Kirby, Edward P. Kirby, her husband, Mary L. D. Putnam and Charles E. Putnam, her husband, to Otis A. Turner, authorizing said Turner to sell and convey a certain tract of land, together with any and all other lands in the State of Illinois, situated in the Military Bounty Tract, which were purchased by or conveyed to Joseph Duncan in his lifetime. (7) A certified copy of a deed, dated March 8, 1865, from Elizabeth C. Duncan, widow, and Joseph Duncan, Edward P. Kirby, Julia S. Kirby, Charles E. Putnam, and Mary L. D. Putnam, by Otis A. Turner, their attorney in fact, to Richard Lloyd,

recorded in Stark county, Illinois, December 9, 1865. (8) A certified copy of a deed, dated December 9, 1865, and recorded December 28, 1868, from said Lloyd to Benson S. Scott. (9) A stipulation that the defendant Stebbins occupied the land in controversy, at the time of the commencement of the suit, as the tenant of the said Scott, and at no time under any other claim.

This evidence was supposed to be sufficient to show that the defendant claimed title through a common source with that of the plaintiffs, and also that the defendant, claiming through the widow and heirs at law of Joseph Duncan, deceased, was under the decree aforesaid, estopped from setting up title.

The plaintiff in error then sought to show that he claimed title to the land through another and different source, and to support this position (see p. 17 of Transcript of Record), he offered the evidence which was introduced in his behalf, and by which he sought to show that Dunbar, the patentee, made a conveyance to John Frank, dated January 6th, 1818, and that John H. W. Frank and Mary Houston, his heirs at law, gave a power of attorney to Francis M. Mills, under which a deed from said John H. W. Frank and Mary Houston, dated January 21st, 1868, by their attorney in fact, was executed to Richard Lloyd, who, on the 9th of December, 1865, according to another deed introduced, had granted, bargained, sold and conveyed this land to said Benson S. Scott, said last named deed being the same which was introduced in evidence on the part of the plaintiffs in the court below.

Title was, as aforesaid, shown under the decree in the case of *The U. S.* v. *The Widow and Heirs of Jos. Duncan, deceased*, and evidence was then presented which tended to show that Benson S. Scott, conceded to be the

landlord of Howard Stebbins, the defendant in the court below, plaintiff in error here, claimed title through a common source with the plaintiffs.

This raised a presumption that said Benson S. Scott, and by consequence the defendant, his tenant, would be estopped from denying the title of the plaintiffs; for the said Scott was thus shown to be in privity with the widow and heirs of said Joseph Duncan, deceased, under a conveyance from whom his claim of title originated, and who were defendants in the decree aforesaid. The decree and the proceedings thereunder bound the said widow and heirs, and would in like manner bind the said Scott, as a privy.

Rorer on Judicial Sales, § 444.

A history of the principal case of *The U. S.* v. *Elizabeth C. Duncan et al.*, will be found in the opinion of Judge Drummond, which by request of members of the bar of Illinois, was published in 12th Illinois, p. 523.

It will be observed that Mr. Lloyd, in his affidavit to put the plaintiff upon proof of title other than through the supposed common source, did not profess to be agent for Benson S. Scott, the defendant's landlord, nor did he profess to disclaim for the said Scott a claim of title from the said supposed common source. He only spoke for the tenant of Scott.

The defendant on his part, professedly sought to show *only that he claimed title to the land through another and different source than that alleged by the plaintiffs.* This was avowedly *the purpose* for which he offered the evidence on his part. (Transcript of Record, 17, marginal p. 39.

Observation of the progress of the trial at this point

will show that it was confessedly necessary for the defendant to adduce evidence to defeat the right of the plaintiffs; and the evidence which he did present was, according to his suggestion of its object, for this one purpose of showing that he claimed title "through another "and different source than that alleged by the plaintiffs."

No question remained when the plaintiffs rested, that the defendant was put to his proofs, first, because he then appeared to be claiming from the common source, and secondly, because of the doctrine of estoppel which would arise under the decree. As to the former of these positions, the defendant then essayed to offer some evidence, confining his statement of its object to that one matter; but as to the other and more important fact, he could make no answer.

We notice that four assignments of error, to wit: the first, second, third and ninth, as given in the printed Transcript of Record, relate to the evidence on the part of the plaintiffs before the defendant opened his case.

The first has reference to the will of Wm. B. Morris, the original plaintiff. The ninth assignment may also be considered in the same connection, as both it and the first one seem to be intended to present the question whether the will of Mr. Morris should have been allowed to be read in evidence.

(*a.*) The point thus raised as to the will and letters testamentary, is that they should have been accompanied by proof that William B. Morris, the testator, had died.

It is submitted in this connection, that no further proof of the death of said Morris was necessary. He had died after issue joined, and the court had accepted the suggestion of counsel of the death, and had directed that

the present defendants in error, his devisees, should be made plaintiffs. (Page 7 of Transcript of Record.) This was in strict conformity with the statute.

(Rev. Stat. Ill., title Ejectment, Ch. 45, Sec. 51; also, title Abatement, Ch. 1, Sec. 10.

As was remarked in *Pile* v. *McBratney*, 15 Ill., 319, "where a fact may be established by proof of general "reputation," and death may be so established, "the "record of a judgment * * * * * is "*prima facie* evidence thereof," &c. Yet it seems to us that the suggestion of the death in this case was sufficient, for no question in regard thereto was made, nor was the order of the court substituting the names of the devisees of the testator objected to in any manner.

The case is distinguishable from *Mutual Benefit Life Ins. Co.* v. *Tisdale*, 91 U. S., 238, for in that case the fact of the death of the policy holder was not only the very groundwork of the action, or that on which any right whatever depended, but there was contrariety of evidence as to whether he had in fact died, and there being some evidence that he was seen alive after the date of the letters of administration, the fact of the granting of those letters was no answer to evidence of that character. There was in that case motive for taking out letters, in order to claim the insurance money; while in this case no right was changed by the death alleged, except only by way of substitution of a new party for the one deceased, without affecting the position or rights of the defendant. The death occurred during the progress of the cause, and the fact was made known to the court, and the suggestion was accepted, and was thenceforth recognized and undisputed. The suggestion was made under and in

pursuance of the statute; and being so authorized, it was at least equivalent to *prima facie* evidence of the death, and having been recognized by the court, and regularly noted on the record, was thereafter proper to be recognized until called in question by traverse of the suggestion. The statute also in this case gave the representatives of the deceased the right to have the case proceed with "like effect as the deceased" could have caused it to proceed. (Rev. Statutes of Illinois, title, "Ejectment," Ch. 45, Sec. 51). To all this there is the added fact that the Probate Court in receiving proof of the will and granting letters testamentary, necessarily required evidence of the testator's death. We have, therefore, in this case, *prima facie* evidence, which arises from the fact of the will being admitted to probate, and letters testamentary being issued thereon, and the additional notation duly made of record, upon suggestion authorized, that while the cause was proceeding such death occurred, and this was thenceforth a recognized fact. The statute does not seem to contemplate the necessity of further proof.

We had more than was required by Greenleaf's Evidence.

1 Greenleaf's Ev., Sec. 550.
Jeffries v. *Radcliff*, 10 N. H., 242, 245.
Cunningham v. *Smith's Administrator*, 70 Pa. State, 458.

Independently of the statute, this case is like *French* v. *Frazier's Administrator*, 7 J. J. Marshall, *425. In that case the death of the plaintiff was suggested before interlocutory or final judgment, and the court allowed the letters testamentary to be regarded as *prima facie* evidence of the death of the plaintiff, and on the introduction

of the same dispensed with the necessity of proceedings by way of *scire facias*, which proceedings would have been proper under the law of Kentucky, but are of course unnecessary under the statute of Illinois.

The common law practice of suing out a *scire facias* on the death of the plaintiff, does not seem to have been required to be observed in ejectment.

2 Tidd's Practice, * 1249;
Sedgwick & Wait on Trial of Title, &c., § 49.

But when, as we have seen, the action is to proceed after suggestion of the plaintiff's death, as if it had not occurred, the legal representatives prosecuting the suit should have the benefit of the suggestion to as full an extent as a new plaintiff would be benefitted by a hearing upon *scire facias*.

(*b.*) The second and third assignments of errors may also be considered in connection with each other. They relate to the power of attorney from Elizabeth C. Duncan *et al.* to Otis A. Turner, and the deed made under the same to Richard Lloyd. The question suggested by these assignments of errors appears to be whether there should have been proof identifying the constituents and grantors with the defendants in the decree of the *United States* v. *Duncan*, aforementioned.

The decree is recited at page 12 of the printed transcript, and said power of attorney and deed are recited at page 16. The power of attorney and deed are from Elizabeth C. Duncan, Joseph Duncan, Julia S. Kirby and husband, and Mary L. D. Putnam and husband. The power of attorney, after describing a certain tract of land, refers in general terms to lands which were purchased by

or conveyed to Joseph Duncan in his lifetime; that is to say, lands in the tract appropriated for military bounties in the State of Illinois.

The decree is against defendants by the same names, with only the difference that, as to Mrs. Kirby, her name is given in the decree as Julia Smith Duncan; and, as to Mrs. Putnam, her name is given in the decree as Mary Louisa Duncan. But the decree shows that the defendants named are widow and heirs of Joseph Duncan, deceased, and that said Duncan died seized of the lands in controversy; and the power of attorney, which was later than the decree, makes reference to lands in the tract appropriated for military bounties, etc., which were purchased by or conveyed to Joseph Duncan in his lifetime. It is plainly evident from the power of attorney that the constituents were the same widow and heirs of Joseph Duncan who were parties to the decree, and the specification in the power of attorney referring to lands in the military tract indicates that the power of attorney embraced this particular tract of land, which is in the military tract.

It was unnecessary for us to prove that after the decree Mary Louisa Duncan married Mr. Putnam, and thereafter, in executing the power of attorney, wrote her name Mary L. D. Putnam, or that Julia Smith Duncan, so named in the decree, had, after the decree, intermarried with Mr. Kirby, and therefore, in signing the power of attorney, used the name of Julia S. Kirby, dropping her maiden name, Duncan. The fact that they joined in a power of attorney with Elizabeth C. Duncan, and Joseph Duncan, son of the deceased Joseph Duncan, coupled with the fact that they were proposing thereby to deal with lands which had been purchased by or conveyed to

of the same dispensed with the necessity of proceedings by way of *scire facias*, which proceedings would have been proper under the law of Kentucky, but are of course unnecessary under the statute of Illinois.

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Joseph Duncan in his lifetime, and which were situated in the military tract, points unequivocally to the tract in question, the title to which the decree found was in Joseph Duncan in his lifetime.

Then, again, some of the constituents, to wit, Elizabeth C. Duncan and Joseph Duncan, bear the same name in the decree, the power of attorney and the deed; and the power of attorney and deed most evidently refer to rights or supposed rights of persons claiming through or under Joseph Duncan, deceased.

The correspondence in names and identity very clearly appear on the face of the papers.

Nor was it necessary to show that Mrs. Putnam and Mrs. Kirby were children of Joseph Duncan, deceased, since they professed to deal with the land in question as land which had been purchased by or conveyed to Joseph Duncan in his lifetime, and it appeared from the decree that this land was directed to be sold on account of the lien of the United States thereon attaching to the title which Joseph Duncan acquired in his lifetime.

On account of the identity in name of some of the constituents in the power of attorney with the defendants in the decree, these papers were admissible; for it was not necessary that all the constituents should be shown to be heirs of Joseph Duncan, deceased. The admissibility of the papers, as evidencing claims under some of the defendants in the decree, is clear, even if the names of Mrs. Putnam and Mrs. Kirby could be regarded as foreign to the decree. But that they were not foreign appears from the facts before recited, and from the further fact that nowhere does it appear that these parties claim any other interest than through the Joseph Duncan whose title was divested under the decree.

(*c.*) Under the title papers above recited, the defendant, through his landlord, Scott, is brought into privity with the widow and heirs of Duncan; and he is estopped from averring to the contrary of the findings of said decree.

No exception was or can be taken to the introduction of said decree. It found explicitly that Joseph Duncan died seized of this land, and directed a sale of the same, and the widow and heirs of Joseph Duncan were parties to this decree. The decree is, therefore, conclusive evidence as against them and their privies.

Carver v. *Jackson*, 4 Peters, 1, 83.
Murray v. *Lovejoy*, 2 Clifford, 200.

The chancery suit on which the decree was based may be said to have been in the nature of a proceeding *in rem*, attaching to the property under consideration, and the proceedings were sufficient in every way to divest the title of the widow and heirs of Joseph Duncan.

In *Lessee of Cooper* v. *Galbraith*, 3 Washington, C. C., 546, the court adopted the doctrine "that a purchaser "under an execution in an ejectment against the defend- "ant in the execution, or one claiming under him, need not "show any other title than the judgment, execution and "sheriff's deed, and that the defendant will not be per- "mitted to controvert such title by showing it to be de- "fective, or by setting up a better outstanding title in a "third person."

This is a principle which is independent of the statute relieving the plaintiff in ejectment, in certain cases, from having to trace title back of the common source. While the plaintiff in error fought against the application of the statute, he made no sufficient answer to the right to apply this principle.

In *Jackson ex dem. Masten* v. *Bush*, 10 Johnson, 223, it was held that in an action of ejectment by a purchaser under a sheriff's sale against a person in possession under the debtor, without title or collusively, the defendant cannot set up an outstanding title in a third person to defeat the recovery of such purchaser. Many cases to the same effect, and illustrating the propriety of applying the doctrine to this case, could be cited. In *Lessee of Culbertson* v. *Martin*, 2 Yeates, 443, the defendant in the execution was in possession when the premises were sold, and upon an ejectment being brought against him under the sheriff's deed, he offered to produce a different title; but the court would not receive evidence of a title adverse to the debtor, but held that the defendant ought to be put to a new action for the trial of his title.

Now, in this case, it appears that Richard Lloyd made claim to this land by deed from the widow and heirs of Joseph Duncan, deceased, which deed was dated March 8, 1865, and on the 9th of December, 1865, Lloyd conveyed by warranty deed to Benson S. Scott. The defendant was admitted to be the tenant of Scott, and, as we have already suggested, Scott has not disclaimed an entry or holding under the claim of title which Lloyd first attempted to convey to him. He may therefore be presumed, as the deeds were placed upon record, to claim through or under the deed from the widow and heirs of Governor Duncan. It was not enough for him, through his tenant, to merely abandon that claim at the time of trial. The cases we have before cited would forbid him from setting up a title adverse to that of Duncan's widow and heirs, especially when he had never surrendered possession, and when, in fact, the only deed which appears to have deen made to him was made by Lloyd, and depend-

ed wholly upon title through said widow and heirs. Nor should the doctrine of enurement, which is grounded upon principles of an equitable character, be allowed to relieve Scott from the necessity of acknowledging that his claim to the title was originally based on the deed from the widow and heirs of Duncan, which deed was adverse to the decree against them. No payment of any consideration money, either by him or his grantor, is shown to have been made after the deed of Mrs. Duncan and children to Lloyd, the grantor, or indeed, at any time; nor does his position appear to have been changed between the time of the acquisition of his first claim of title and the commencement of this suit. Setting up claim or coming in under Duncan's widow and heirs, he is in no better state as to setting up an adverse title than is a tenant as against a landlord suing for possession, where such tenant lays claim under an adverse title acquired during his lease, as to which case see

Lessee of Galloway v. *Ogle*, 2 Binney, 468.

The affidavit of Mr. Lloyd discloses the fact that Stebbins, the defendant, was in possession claiming title under an unexpired lease from Scott, but when the lease was given, does not appear. It is as fair to assume that it was given before the deed from John H. W. Frank and Mary Houston to Lloyd as it would be to assume that it was given at a later date. It was for the defendant to show that the lease did not antedate said deed, and he did not choose to do so.

But if the plaintiff in error should insist on any supposed right accruing to his landlord under the law as to enurement, it may be answered further, that in making such claim the defendant necessarily connects himself with the deed of Lloyd to Scott, which had no other foundation

than the claim made under Duncan's widow and heirs; and therefore, on the face of the papers, the defendant does not disconnect himself from that deed, under which the estoppel exists, because the deed is in opposition to the decree.

The charge of the court on the matter of the estoppel as against the heirs of Duncan and grantees of his heirs, is that upon the state of facts presented, that is, upon the showing of the muniments of title, taking the decree against Duncan's widow and heirs as a foundation on the part of the plaintiffs, and observing that the widow and heirs subsequently appointed Mills their attorney in fact, and through him, as attorney in fact, made the deed to Lloyd, and that Lloyd conveyed to Scott, the plaintiffs would, upon this evidence, be entitled to recover. No valid objection to this part of the charge is perceived. No prayer for a qualification, or for a direction based on the defendant's evidence, is preserved, or the charge thereon does not appear.

If the defendant could entirely repudiate the claim of title under the heirs of Duncan, his own landlord being silent in respect to any disclaimer, there would be no ground for objection on his part to this part of the charge.

It would be merely carrying out a theory in reference to which he could not pretend to have any interest. If he did not claim under the widow and heirs of Duncan, it was immaterial to him whether they were estopped or not. But at this point it is to be borne in mind that when the plaintiffs first rested there was evidence strongly tending to show that the claim of the defendant was under Duncan's widow and heirs. He then took up the matter of the introduction of evidence on his own part, and did

so for the purpose of showing that he did not claim under the said widow and heirs, but claimed through another and different source.

In his presentation of the evidence he did not disconnect himself from the title which Scott, his landlord, claimed to have through the deed Lloyd made on the 9th day of December, 1865, but merely showed that Lloyd, after he made that deed, received another deed from John H. W. Frank and Mary Houston, and no evidence was introduced to show that he or his landlord had changed position or relations in any way in view of the latter deed to Lloyd. This deed seems, indeed, not to have been regarded as worthy of record, for when introduced in evidence it was unrecorded. (Page 20 of Transcript.) Hence, there was no proof of any disconnection between the original claim of Scott through the deed of December 9, 1865, from Lloyd, and the deed made at a later date. It did not appear that Scott refrained from taking possession until after the deed to Lloyd of January 21, 1868. Therefore, the defendant failed to disconnect himself entirely from the claim of title through the widow and heirs of Duncan; and his landlord, Scott, made no disclaimer in any form of the claim of title under said widow and heirs.

II.

A second general proposition, on which affirmance of the judgment is asked, is, that if for argument's sake we should concede that the defendant sufficiently disconnected himself from claim under the said widow and heirs, and if we should further concede that the defendant put

himself in a position to try title under Dunbar, the patentee, the superiority of the plaintiff's title still appears.

Bearing in mind, therefore, that the defendant's evidence was avowedly offered merely to show that he claimed title from a different source from that alleged by the plaintiffs, we proceed to consider the evidence relating to the claims which arise under the two deeds from Dunbar, the patentee.

The plaintiffs, if required to go behind the common source, relied upon the deed from Dunbar to Prout. A certified transcript of the record of this deed was read in evidence, in connection with proof of the loss of the original, and the signatures of the witnesses to the deed were satisfactorily proved. (See page 20, Transcript of Record. The depositions of Middleton and Collard proved the signature of Samuel N. Smallwood, and the signature of Joseph Cassin, the other witness, was proved by the deposition of Henrietta H. Boone, or rather by the testimony of Mr. Hyde, giving the contents of the deposition of Mrs. Boone, the original deposition having been destroyed in the fire.

Three questions seem to be suggested by the bill of exceptions in regard to this deed, and the evidence of its authenticity. The first question pertains to the introduction of the certified transcript of the record. The original was destroyed in the great fire of October 8 and 9, 1871, in Chicago, together with the files in this cause, and the records and files in the United States courts in Chicago. At the time of such destruction the depositions just mentioned had been placed on file in this cause. The original of this deed was, in the first instance, attached to the depositions of Middleton and Collard.

It was afterwards detached from those depositions in

order to be exhibited to Mrs. Boone, and after being so exhibited was attached to her deposition, as to the signature of her uncle, Joseph Cassin, one of the witnesses to the deed. Because the original deed was so destroyed, a copy was obtained from the Recorder's office in Madison county, Illinois, where the original was recorded, January 23, 1818. The obtaining of such copy was in order to give a full copy of the deed.

The fact that it corresponded with the original was proved by evidence independent of the certificate of the Recorder, the evidence being that the original deed corresponded substantially in contents with the writing offered in evidence, saving only the official certificate of the recorder, stating that it was a copy, which certificate was made after the destruction of the original. (See page 23 of the Transcript of the Record.)

The course pursued in respect to the proof of this deed in part by introducing a transcript of the record is the course which was suggested and adopted in *Reed* v. *Kemp*, 16 Ill., 451. It is not claimed in this connection that the certified copy was in itself sufficient evidence of the genuineness of the original, but such certified copy, when independent evidence also showed it was a copy, was made the foundation for introducing evidence as to the genuineness of the original. The fact that it appeared of record was sufficiently evidenced by the certificate of the Recorder. (Revised Statutes Ill., title "Conveyances," Chap. 20, §§ 31, 36.)

The act of the general assembly entitled, "An Act "concerning the recording of conveyances," approved July 21, 1837 (see Purple's Real Estate Statutes, page 496), provided that the recording of any deed by the recorder of the county in which the lands were situated

should be deemed notice, etc., whether the said writing had been acknowledged or proven in conformity with the laws of the state or not. This act was also made applicable to writings of record before its passage, as well as those admitted to record after its enactment, and therefore applies to this deed. The certified transcript of the record of this deed was therefore proper to be procured, and was subject to be introduced for verification by the witnesses as a copy, and in connection with competent evidence of the execution of the original.

This brings us, therefore, to the second question, which is, whether there was competent proof of the execution of the original? Proof of the handwriting of the witnesses was sufficient. The loss of the original being established as having occurred in the destruction of the files of the court below, through the great fire in Chicago, secondary evidence of the execution of the deed was admissible, and on this subject Greenleaf says: "When secondary evi-
"dence of the execution of an instrument is * * *
"rendered admissible, it will not be necessary to prove
"the *handwriting* of more than one witness, and this evi-
"dence is in general, deemed sufficient to admit the in-
"strument to be read."

1 Greenleaf on Ev., Sec. 575.

In *Lessee of Clarke* v. *Courtney*, 5 Peters, *342–4, this court favored the proof of the handwriting of the subscribing witnesses rather than proof of the signature of the maker of the instrument.

In the case under consideration, there was proof of the death of the subscribing witnesses, and, therefore, secondary evidence of their handwriting was admissible; and it may perhaps be said to have been highly proper to prove their handwriting rather than that of Dunbar,

for observation of some of the writings witnessed by them, purporting to have been executed by him, indicates that he was so poor a penman as to have made his mark in signing some of the papers connected with his conveyance.

That a copy of the depositions of Middleton and Collard was proper to be read, appears from the fact that the originals were destroyed in the great fire, and that this copy had been, with the consent of the counsel for the defendant, placed on file as a copy of the original depositions. (See page 24 of Transcript of Record.) The production of this copy by the counsel of the defendant, and his consent to have it filed as a copy of the original, substantiated it as a copy; and the original having been destroyed, it was not necessary to go through the form of making further proof, that it was a copy of the original.

Aulger v. *Smith*, 34 Ill., 534.
Ruch v. *R. I.*, 97 U. S., 694.

The latter was a case like the present, where depositions had been destroyed by fire, and their contents were allowed to be proved, while here a full copy, authenticated by the counsel of the defendant was, with his consent, placed on file; and further proof of the contents, therefore, became unnecessary. The remaining objection that the court adverted to the fact of the record of this deed, has, perhaps been sufficiently answered already. But that there was such record appears, not alone from the authentication by the recorder in giving the transcript, but from the proof of the original. The reason of the giving of evidence by Mr. W. W. Corcoran, was to show the *bona fides* of his purchase from the United States; and proof of the payment of taxes by Mr. Hyde had a like bearing, and besides, tended to show acts of owner-

ship on the part of Mr. Corcoran before he made his conveyance to William B. Morris, the original plaintiff.

There stand in the way of the plaintiff in error, defendant in the court below, different obstacles to setting up any claim under the alleged deed from Dunbar to Frank.

(1.) The objection that his landlord, Scott, first claimed through a deed from Lloyd, which was evidently based solely on the deed made by the widow and heirs of Duncan, and did not seem to have claimed, nor to have put the defendant in a position to claim, under any other claim of title. So that there was an *estoppel*, as before argued.

(2.) The evidence offered on the part of the defendant was offered only to show that he did not claim from the common source, and lacked material points necessary to disconnect Scott or his tenant from the claim of title through the deed of the widow and heirs of Duncan, no evidence of any surrender of possession or any change of possession after Lloyd got a second deed being offered.

(3.) The fact of the record in Madison county of the deed to Prout was not necessary to be shown. It was sufficient to prove the genuineness of the original.

But if we may suppose that the question of superiority of title was presented on the ground of conflicting deeds of the same date having been made by Dunbar, our answer again is: First. That the absence of proof of consideration for the deed set up by the defendant as having been made by Dunbar to Frank, deprives the defendant of right to claim in hostility to the deed of

Dunbar to Prout. It does not appear that Frank purchased in good faith. There should have been proof of the payment of purchase money independently of the deed, and it was necessary to show an element of equity, which is wholly wanting.

Brown v. *Welch*, 18 Ill., 343.
Wait v. *Smith*, 92 Ill., 386.

The United States, through whom we trace title, became entitled to the rights of a *bona fide* purchaser, on account of its lien and rights under the decree, but on the part of the defendant there was no evidence of the payment of any consideration whatever. Again, on the part of the plaintiffs, there was evidence of the payment of an adequate consideration by Mr. Corcoran, in reliance upon the title which had been vested in Joseph Duncan, and also in the absence of any record of the deed alleged by the defendant to have been made by Dunbar to Frank.

Secondly. This alleged deed, though dated January 6, 1818, was withheld from the records until June 18, 1870. Under divers statutes of Illinois it became void, because unrecorded.

Act of January 31, 1827, p. 480, Purple's Real Estate Statutes.
Act of January 13, 1833, *ib.* p. 489.
Rev. Stat. Ill., title, "Conveyances," Chap. 30, Sec. 30.

The plaintiffs in error, claiming under Mr. Corcoran, had a right to raise this objection, and to show the good faith of Mr. Corcoran; and in the absence of proof of any consideration paid by any parties claiming adversely to the plaintiffs, the alleged deed of Dunbar to Frank completely fails, and must be adjudged to be void. If so void,

and it seems to be clearly so in this state of case, no foundation for claim of title on the part of the defendant remained. The deed to Frank was subject to greaf suspicion, also, because it was kept off of the records, and only a copy produced.

In connection with the proof by Mr. Corcoran and Mr. Hyde as to the payment of money by Mr. Corcoran for taxes for the years 1847 to 1868, inclusive, some tax receipts for some of these years were introduced. They were evidence tending with the proof of other facts to show that Mr. Corcoran acted in good faith, and exercised acts of ownership over the property under his title. But it will be noticed here that those only of these tax receipts, the signatures to which were proved, were read in evidence. This appears from the close of the first paragraph, beginning at page 27 of the printed transcript of the record.

The payment of the taxes was further shown by transcripts from the tax collector's books in Stark county, Illinois. The statutes of Illinois (Rev. Stat. Ill., title "Revenue," Chap. 120, Sec. 212), provide for the making of such transcripts by the clerk of the County court. The provision is that books and records belonging to the office of the County Clerk, or copies thereof certified by said clerk, "shall be deemed *prima facie* evi-"dence to prove * * * the payment of taxes," etc. These tax collectors' books, transcripts from which were so produced, were books made out for the collectors, and required to be returned into the county clerk's office, and they were the books referred to in the provision of the law last above cited.

The record does not show any prayer for instructions on the part of the defendant, nor does it disclose any evi-

dence of the payment of any consideration by any party claiming adversely to the plaintiffs. The defendant was therefore to be regarded as being in privity with the defendants in the decree in *United States* v. *Duncan*, or as a volunteer setting up a fraudulent and void claim, and in no position to resist a recovery by the plaintiffs.

Respectfully submitted.

THOMAS DENT,

For Defts. in Error.